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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JON E. EDMOND, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

AND OTHER CASES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Armed Forces err in concluding that judges of the military Courts of Criminal Appeals, who have expansive authority to decide questions of law and fact, most of whose decisions are never reviewed by higher authority, and who have no "superior officer" over them, are nonetheless inferior officers under the Appointments Clause of the Constitution?

2. If such judges are inferior officers, did the Court of Appeals err in finding the authority to appoint them in a general residual appointment authority, even though Congress has specifically provided for another method of appointment for such judges which admittedly does not satisfy the Appointments Clause?

LISTING OF PARTIES PURSUANT TO RULE 24.1(b)

Jon E. Edmond, U.S. Coast Guard
USCAAF Dkt. No. 93-1292/CG
CGCCA Dkt. No. 999

Jake A. Lazenby, U.S. Coast Guard
USCAAF Dkt. No. 95-0941/CG
CGCCA Dkt. No. 1025

Michael B. Leaver, U.S. Coast Guard
USCAAF Dkt. No. 95-0909/CG
CGCCA Dkt. No. 946

James A. Leonard, U.S. Coast Guard
USCAAF Dkt. No. 95-0702/CG
CGCCA Dkt. No. 1039

Robert J. Nichols, U.S. Coast Guard
USCAAF Dkt. No. 95-1130/CG
CGCCA Dkt. No. 1045

Donald H. Venable, U.S. Coast Guard
USCAAF Dkt. No. 96-0401/CG
CGCCA Dkt. No. 1053

United States of America

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, Jon E. Edmond, *et al.*, respectfully pray that writs of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Armed Forces entered in these proceedings.

OPINIONS BELOW

The decision on reconsideration of the United States Court of Appeals for the Armed Forces, *United States v.*

Edmond, Dkt. No. 93-1292/CG (C.A.A.F. June 27, 1996) is reprinted as Appendix A at App. 1a. The decision of the United States Court of Appeals for the Armed Forces, *United States v. Edmond*, 41 M.J. 419, *rev'd*, 116 S. Ct. 43 (1995)(summary disposition), is reprinted as Appendix B at App. 2a. The opinion of the United States Coast Guard Court of Military Review, *United States v. Edmond*, 37 M.J. 787 (C.G.C.M.R. 1993), is reprinted as Appendix C at App. 12a.[1]

The order of the United States Court of Appeals for the Armed Forces, *United States v. Lazenby*, Dkt. No. 95-0941/CG (C.A.A.F. May 21, 1996) is reprinted as Appendix D at App. 34a. The opinion of the United States Coast Guard Court of Criminal Appeals, *United States v. Lazenby*, 42 M.J. 702 (C.G. Ct. Crim. App. 1995), is reprinted as Appendix E at App. 35a.

The order of the United States Court of Appeals for the Armed Forces, *United States v. Leaver*, Dkt. No. 95-0909/CG (C.A.A.F. May 21, 1996) is reprinted as Appendix F at App. 44a. The opinion of the United States Coast Guard Court of Criminal Appeals, *United States v. Leaver*, 42 M.J. 599 (C.G. Ct. Crim. App. 1995), is reprinted as Appendix G at App. 45a.

The order of the United States Court of Appeals for the Armed Forces, *United States v. Leonard*, Dkt. No. 95-0702/CG (C.A.A.F. May 21, 1996) is reprinted as Appendix H at App. 48a. The opinion of the United States Coast Guard

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[1] Effective October 5, 1994, the name of the U.S. Court of Military Appeals was changed to the U.S. Court of Appeals for the Armed Forces, and the names of the service Courts of Military Review were changed to the Courts of Criminal Appeals. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2663, 2831 (1994). This petition will use the names as of the dates of the decisions in each case.

Court of Criminal Appeals, *United States v. Leonard*, 41 M.J. 900 (C.G. Ct. Crim. App. 1995), is reprinted as Appendix I at App. 49a.

The order of the United States Court of Appeals for the Armed Forces, *United States v. Nichols*, Dkt. No. 95-1130/CG (C.A.A.F. May 21, 1996) is reprinted as Appendix J at App. 60a. The opinion of the United States Coast Guard Court of Criminal Appeals, *United States v. Nichols*, Dkt. No. 1045 (C.G. Ct. Crim. App. July 14, 1995), is reprinted as Appendix K at App. 61a.

The order of the United States Court of Appeals for the Armed Forces, *United States v. Venable*, Dkt. No. 96-0401/CG (C.A.A.F. May 21, 1996) is reprinted as Appendix L at App. 65a. The opinion of the United States Coast Guard Court of Criminal Appeals, *United States v. Venable*, Dkt. No. 1053 (C.G. Ct. Crim. App. December 7, 1995), is reprinted as Appendix M at App. 66a.

JURISDICTION

The decisions of the Court of Appeals for the Armed Forces were issued on May 21 and June 27, 1996. The jurisdiction of this Court is invoked under Article 67a of the Uniform Code of Military Justice, 10 U.S.C. § 867a (Supp. II 1990) and 28 U.S.C. § 1259(3) (Supp. II 1990).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, provides:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint

Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The relevant provision of the Uniform Code of Military Justice, Article 66, 10 U.S.C.A. § 866 (West 1995), provides in pertinent part:

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State.

* * *

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it

may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

* * *

The relevant provision of Title 49 of the United States Code, 49 U.S.C. § 323(a) (1988), provides:

The Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation and may prescribe their duties and powers.

STATEMENT OF THE CASE

This is a consolidated petition representing all interested Coast Guard members of varying ranks whose court-martial convictions were affirmed by the Court of Appeals for the Armed Forces on May 21 and June 27, 1996. In each case, the Court of Appeals for the Armed Forces granted review, and rendered adverse summary dispositions in light of *United States v. Ryder*, 44 M.J. 9 (C.A.A.F. 1996). Each case is factually distinct, but the facts critical to a resolution of the issue presented in this petition are identical. Each case involved conviction and sentence by a general or special court-martial. Each case was reviewed in the Coast Guard Court of Criminal Appeals by a panel consisting partially of commissioned officers, and also containing at least one civilian judge. This petition challenges the validity of the appointments of the civilian judges only.

A. Background

Knowledge of three military cases is necessary to a full understanding of the issue presented in this case. Those cases

are *Weiss v. United States*, 114 S. Ct. 752 (1994);*Ryder v. United States*, 115 S. Ct. 2031 (1995); and *United States v. Ryder*, 44 M.J. 9 (1996)

In *Weiss*, this Court affirmed the decision of the Court of Military Appeals which had affirmed the petitioner's conviction. The case involved a contention that the appointments of the military trial and appellate judges who heard and reviewed the petitioner's case had not been made in compliance with the Appointments Clause of the Constitution. *Weiss*, 114 S. Ct. at 754–755. This Court concluded that the Appointments Clause applied to the appointment of military trial and appellate judges, but that appointment as a commissioned officer of the armed forces, with the advice and consent of the Senate, satisfies the Appointments Clause for those judges who are already commissioned officers on active duty. *Weiss*, 114 S. Ct. at 757, 760. However, the Court specifically declined to apply that conclusion to the appointment of civilians to service courts of military review. *Weiss*, 114 S. Ct. at 757 n.4. The Court noted that the "constitutionality of the provision allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question. See Art. 66(a), UCMJ, 10 U.S.C. § 866(a). It is not at issue here." *Id.*

On January 15, 1993, after the decision of the Court of Military Appeals in *Weiss*, the Secretary of Transportation signed a memorandum which "adopted" the prior appointments of the Coast Guard Court of Military Review judges as "appointments of [his] own." *See United States v. Carpenter*, 37 M.J. 291, 300 (C.M.A. 1993). This memorandum was prepared and signed by the Secretary upon the suggestion of the judges of the Coast Guard Court of

Military Review. *United States v. Senior*, 36 M.J. 1016, 1018 (C.G.C.M.R. 1993).

In *Carpenter*, the Court of Military Appeals considered the issue of the appointment of civilian Court of Military Review judges. *Carpenter*, 37 M.J. at 293. The court correctly concluded that Chief Judge Baum's appointment to the court of military review was defective because he was a civilian. *Carpenter*, 37 M.J. at 295. However, the court concluded that no relief was necessary, because it afforded *de facto* validity to the acts of the Chief Judge, relying on *Buckley v. Valeo*, 424 U.S. 1 (1976). The court also noted the January 15, 1993, memorandum of the Secretary of Transportation purporting to appoint the judges of the Coast Guard Court of Military Review, including Chief Judge Baum, and suggested that this corrected the violation of the Appointments Clause. *Carpenter*, 37 M.J. at 295 and 294 n.1.

The issue of the propriety of affording *de facto* validity to the acts of unconstitutionally appointed appellate military judges who reviewed a criminal case was addressed by this Court in *Ryder v. United States*, 115 S.Ct. 2031 (1995). This Court concluded that the *de facto* officer doctrine did not apply to the acts of the improperly–appointed civilian judges, at least in cases in which the issue was raised to the court while the case was undergoing direct review by it. This decision required new reviews by the Coast Guard Court with properly–appointed judges for cases still on direct review that were decided before the January 15, 1993, memorandum of the Secretary of Transportation.

Both *Carpenter* and *Ryder* were decided by the Coast Guard Court of Military Review before January 15, 1993. Therefore, the validity of the memorandum of the Secretary of Transportation issued on that date, which purports to appoint the judges of the Coast Guard court, was not at issue,

and the comment in *Carpenter* suggesting its validity was simply dicta.

On remand in *Ryder*, the Court of Appeals for the Armed Forces considered the question of whether the remaining civilian judge of the Coast Guard Court is now properly appointed by the Secretary's action. The court concluded that judges of the Courts of Criminal Appeals are inferior officers of the United States, and that the Secretary of Transportation has the authority to appoint those judges. *Ryder*, 44 M.J. at 11. The court relied on Justice Souter's concurring opinion in *Weiss* for its conclusion that the judges of the Courts of Criminal Appeals are inferior officers. *Id.; Weiss*, 114 S. Ct. at 769 (Souter, J., concurring). The court relied on the general statutory provision permitting the Secretary of Transportation to appoint subordinates in the Department of Transportation for its conclusion that the Secretary had authority to appoint the judges. *Ryder*, 44 M.J. at 11–12; 49 U.S.C. 323(a). As a result, it remanded *Ryder* to a newly constituted (and therefore constitutional) Coast Guard Court of Criminal Appeals to review his conviction.

B. These cases

In each of these cases, the court–martial conviction and sentence was reviewed by a panel of three judges of the Coast Guard Court of Criminal Appeals. Each panel included Chief Judge Baum, a civilian, and two other judges. In *Lazenby* and *Leonard* the panels also included Judge Bridgman, the Coast Guard Court's other civilian judge, who has since retired. The other judges in these cases were active–duty commissioned officers. Each of the court's decisions was issued after January 15, 1993, the date of the Secretary's appointing memorandum. In each case, the Coast Guard court affirmed the conviction and sentence.

On further discretionary appeal to the Court of Appeals for the Armed Forces, the court affirmed the findings and sentence, relying on its recent decision on remand in *Ryder*.

REASONS FOR GRANTING THE WRIT

A. The Issues Presented Are Important.

This case presents an important unanswered question concerning the authority of the Secretary of Transportation to make appointments to the Coast Guard Court of Criminal Appeals. Petitioners contend that the Secretary cannot appoint the judges of the Coast Guard Court because those judges are principal officers who must be appointed by the President with the advice and consent of the Senate. Even if the judges of the Coast Guard Court are inferior officers, the statute relied upon by the government to justify their appointments by the Secretary is inapplicable.

The Coast Guard Court of Criminal Appeals typically decides between twenty and thirty cases each year. *See Annual Report of the Chief Counsel of the U.S. Coast Guard* (FY 1990), *reprinted at* 32 M.J. CXCI, CXCVII (26 cases decided); *Annual Report of the Chief Counsel of the U.S. Coast Guard* (FY 1991), *reprinted at* 34 M.J. CXXXV, CXLII (28 cases decided); *Annual Report of the Chief Counsel of the U.S. Coast Guard* (FY 1992), *reprinted at* 38 M.J. CLXXXV, CXCII (25 cases decided); *Annual Report of the Chief Counsel of the U.S. Coast Guard* (FY 1993), *reprinted at* 39 M.J. CLXXVI, CLXXXIV (22 cases decided). The court will foreseeably continue to do so, with the appointment status of its chief judge (who sits on essentially all cases heard by the court) in doubt. The issue may continue to be raised, both on direct appeal and potentially in collateral

proceedings, until this Court decides the question presented in this petition.

Petitioners acknowledge that there is no conflict in the circuits on the precise question presented, nor is one likely to arise unless a member of the Coast Guard should successfully pursue his claim on *habeas corpus* and create one that way. But the absence of a conflict did not deter this Court from granting review in *Weiss, Ryder,* and, more recently, in *Loving v. United States*, 116 S.Ct. 1737 (1996), where, as here, there is a systemic issue that will continue to arise and potentially affect large numbers of people in the armed forces. In addition, as noted above, the issue in this petition was expressly left open in *Weiss* and the necessity for resolving it was made inevitable by the remand in *Ryder*.

Although the precise question of whether Coast Guard appellate judges are principal or inferior officers will resolve only this group of cases, its resolution will supplement this Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988), and thus provide further guidance to the lower courts and Congress. Furthermore, the proper application of the principal/inferior officer distinction, and the type of statute needed to satisfy the "by law" requirement in the Appointments Clause, continues to be a source of uncertainty in other contexts. See *Commonwealth of Pennsylvania v. Dept. of Health and Human Services*, 80 F.3rd 796, 801–06 (3rd Cir. 1996). Since there is never likely to be a conflict in the circuits on this particular Appointments Clause issue, the importance of granting review can also be gleaned from a summary of the arguments in opposition to the decision below.

B. The Decision Below is Erroneous

1. The judges of the Courts of Criminal Appeals are principal officers who must be appointed by the President with the Advice and Consent of the Senate.

Petitioners contend that the Secretary's memorandum was not a proper appointment of the judges of the Coast Guard Court because those judges are "principal" officers of the United States who must be appointed by the President with the advice and consent of the Senate. This question has not been directly addressed by this Court.

In a concurring opinion in *Weiss*, Justice Souter alone discussed this issue. 114 S. Ct. at 763–769. He concluded that all military judges are inferior officers. However, Justice Souter recognized that "there is a good deal of force to the argument that military judges, at least those on the Courts of Military Review, are principal officers . . .." *Weiss*, 114 S. Ct. at 769. Justice Scalia, in a separate concurring opinion joined by Justice Thomas, indicated that this subject should not even have been addressed in that case. *Weiss*, 114 S. Ct. at 770 n.*.

Petitioners contend that the functional analysis that was used in *Morrison v. Olson*, 487 U.S. 654–671–673 (1988), to determine whether the independent counsel was a principal or inferior officer should be applied to determine the status of the judges at issue here. Petitioners contend that this analysis, when applied to the intermediate military appellate judges, leads to the conclusion that they are principal officers.

The courts of criminal appeals provide the only appeal of right for military members convicted at courts-martial, and, in effect, are the appeal of last resort for most military

defendants. This review is particularly important given the extraordinarily broad appellate authority of the Courts of Criminal Appeals. These courts exercise all of the traditional powers of appellate courts, as well as an "awesome, plenary, *de novo* power of review[.]" *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). Thus, a Court of Criminal Appeals "may affirm only such findings of guilty and the sentence as it finds correct in law and fact . . .. [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact[.]" Art. 66(c), UCMJ, 10 U.S.C. § 866(c). And, absent waiver by an accused, the Courts of Criminal Appeals are required to review all cases in which the death penalty, confinement for one year or more, a dismissal, or a dishonorable or bad-conduct discharge is part of the approved sentence. Art. 66(b), UCMJ, 10 U.S.C. § 866(b).

Furthermore, if the judges of the Courts of Criminal Appeals are inferior officers, who are their superiors? The services, indeed the United States itself, is bound to carry out the courts' decisions unless reversed or modified in some way by a superior court. *See* Arts. 66(c), 75, UCMJ. The decisions of the Courts of Criminal Appeals, in the vast majority of cases, are subject to review only upon the grant of a petition for grant of review by the Court of Appeals for the Armed Forces. Art. 67(a), UCMJ, 10 U.S.C. § 867(a). Only a small portion of cases in which petitions for review are filed are actually reviewed by the Court of Appeals. *See Annual Report of the U.S. Court of Military Appeals* (FY 1991), *reprinted at* 34 M.J. LXIII, LXXVII (1,811 petitions for grant of review filed, 151 (8.3%) granted); *Annual Report of the U.S. Court of Military Appeals* (FY 1992), *reprinted at* 38 M.J. CXXI, CXXXIII (1,283 petitions for grant of review filed, 182 (14.2%) granted). Other than its power of higher review, the Court of Appeals for the Armed Forces does not

exercise routine supervisory authority over the Courts of Criminal Appeals like Department Heads do over those who work for them.

This Court should review these cases to make it clear that the broad power and authority of these judges are those of a principal officer of the United States. Principal officers must be appointed by the President, with the advice and consent of the Senate. U.S. Const., art. II, § 2, cl. 2. Thus, the appointment by the Secretary of Transportation is not valid.

2. Even if the judges of the Courts of Criminal Appeals are inferior officers, the Secretary of Transportation does not have the statutory authority to appoint them.

The Appointments Clause of the Constitution permits heads of departments to appoint inferior officers only when Congress has so permitted "by Law." U.S. Const. art. II, § 2, cl. 2. If Congress does not specifically, by law, vest the power to appoint inferior officers to a specific office, then those officers fall into the category of "all other officers of the United States, whose Appointments are not herein otherwise provided for . . .." *Id*. Under the Appointments Clause, the authority to make those appointments would then fall to the President, with the advice and consent of the Senate. Similarly, if Congress provides by law for the appointment of an officer, but does so in an unconstitutional manner, that provision has no effect, and the residual appointment power of the President, with the advice and consent of the Senate, applies. *Id*.; *Appointment of Assistant Assessors of Internal Revenue*, 11 Op. Att'y Gen. 209 (1865). There is no inherent authority in the head of a department to make appointments of officers in the department. *United States v. Perkins*, 116 U.S. 483 (1886).

Therefore, the Secretary of Transportation cannot rely upon any inherent authority as the head of the department to appoint the judges of the Coast Guard Court of Criminal Appeals. Statutory authority is required, and it must be reasonably specific. *See Cain v. United States*, 73 F. Supp. 1019, 1021 (N.D.Ill. 1947).

The statute relied upon by the Government to support the Secretary's appointments here, 49 U.S.C. § 323(a), is not specific, but quite general.[2] By its terms, it would appear to permit the Secretary of Transportation to appoint *all* other officers of the department. Even appointment of other principal officers of the Department is not excluded, and would apparently be permitted by this statute. However, this would clearly be a violation of the Appointments Clause.

The impropriety of using the statute for the appointments at issue here is also apparent when one considers the several other statutory provisions that relate to appointments of other inferior officers of the department. For example, 49 U.S.C. § 102(e) permits the Secretary to appoint the Assistant Secretary for Administration; 49 U.S.C. § 104(b)(2) permits the Secretary to appoint the Deputy Federal Highway Administrator; 49 U.S.C. § 104(b)(3) permits the Secretary to appoint the Assistant Administrator of the Federal Highway Administration; 49 U.S.C. § 105(b) permits the Secretary to appoint the Deputy Administrator of the National Highway Traffic Safety Administration. None of these provisions would be necessary if 49 U.S.C. § 323(a) were read literally.

Therefore, there must be an implied, common sense exception in 49 U.S.C. § 323(a); specifically, the statute does

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[2] The Secretary's appointing memorandum itself refers to no legal authority whatsoever for the Secretary's action. *Carpenter*, 37 M.J. at 300. However, 49 U.S.C. § 323(a) has been relied upon by the government and the Court of Appeals for the Armed Forces. *Ryder*, 44 M.J. at 11.

not apply if the appointment of an officer is otherwise provided for by law. But, the authority to appoint appellate military judges is otherwise provided for by law. Art. 66(a), UCMJ, 10 U.S.C. § 866(a). However, that specific provision is unconstitutional, at least as applied to the appointment of civilians. *Carpenter*, 37 M.J. at 294. As indicated above, when Congress fails to specify how an officer is to be appointed, or provides for appointment in an unconstitutional manner, the method of appointment must be made by the President with the advice and consent of the Senate.

Furthermore, Petitioners contend that the memorandum of the Secretary is of no effect because the well-settled rule of statutory interpretation is that, if two statutory provisions deal with the same subject, one is general in its application and the other specific, and the two provisions are in conflict, the specific provision is to be applied. *Busic v. United States*, 446 U.S. 398, 406 (1980). That is exactly the situation involved here. The two statutes in question are Art. 66(a), UCMJ, 10 U.S.C. § 866(a), and 49 U.S.C. § 323(a). Both statutory provisions concern, at least in part, the appointment of officers of the United States within the Department of Transportation. One provision is general and one specific in terms of appointment of officers. Article 66(a), UCMJ, is specific in that it addresses only the appointment of the judges of the Courts of Criminal Appeals; 49 U.S.C. § 323(a) is general in that it addresses the appointment powers of the Secretary generally, department-wide. The two provisions are in conflict. In Art. 66(a), UCMJ, Congress directed the service Judge Advocate General to appoint the judges of the service Court of Criminal Appeals. In 49 U.S.C. § 323(a), Congress authorized the Secretary of Transportation to appoint officers of the department generally, not specifically naming any particular officers or positions. Therefore, it is

clear that the rules of statutory interpretation and application require that the specific provision, Art. 66(a), UCMJ, be given effect over the general provision, 49 U.S.C. § 323(a). Thus, Congress gave the power to appoint the judges of the Coast Guard Court of Criminal Appeals to the Judge Advocate General, and not to the Secretary.

Finally, the last clause in 49 U.S.C. §323(a) confirms the interpretation urged by petitioners -- that the entire provision does not apply when Congress has otherwise specifically spoken on the issue. That final clause permits the Secretary, with respect to those officers and employees whom he is authorized to appoint and to fix their pay, to "prescribe their duties and powers." If the Government is correct that section 323(a) applies to the Coast Guard Court of Criminal Appeals, then the Secretary also may alter the duties of the civilian judges that he appoints and, by the same token, appoint the military judges and alter their powers and duties also, despite the clear mandates of Art. 66, UCMJ. And, presumably, he could also change the duties and the pay for the other statutory officers in the Department noted on page 14, *supra*. There is, however, nothing in section 323(a) that gives a hint that Congress intended to confer such sweeping authority in what is essentially a housekeeping measure.

Because the decision below is so plainly in error, and because it would allow the Secretary (and perhaps other department heads with similarly broad residual appointment powers) to override specific appointment decisions made elsewhere by Congress, this Court should grant review.

CONCLUSION

For the reasons stated, petitioner prays that this Court grant review of the two questions presented.

Respectfully submitted,

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August 1996

APPENDIX A

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

USCA Dkt. No. 93-1292/CG
Crim. App. No. 999

United States, Appellee

v.

Jon E. Edmond, (459-31-5670), Appellant

ORDER

On consideration of appellee's petition for reconsideration of the order of the Court issued on May 21, 1996, it is, by the Court this 27th day of June, 1996,

ORDERED:

That said petition is hereby granted;

That the order of the Court issued on May 21, 1996 is vacated; and

That the decision of the United States Coast Guard Court of Military Review is affirmed.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of the Court

APPENDIX B

UNITED STATES, Appellee

v.

Jon E. Edmond
Fire Control Technician Third Class, U.S. Coast Guard

No. 93-1292

CMR No. 999

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

Argued October 6, 1994

Decided February 28, 1995

[41 M.J. 419]

For Appellant: *Lieutenant Commander Allen Lotz* (argued).
For Appellee: *Lieutenant John f. Koeppen* (argued).
Military Judge: Douglas F. Smith

Opinion of the Court

CRAWFORD, Judge:

1. Contrary to his pleas, appellant was convicted of being an accessory after the fact to attempted sodomy, 3 bad-check offenses, and committing an indecent act, in violation of Articles 78 and 134, Uniform Code of Military Justice, 10 USC §§ 878 and 934, respectively. The convening authority

approved the sentence of a bad-conduct discharge, confinement for 1 year, total forfeitures, and reduction to the lowest enlisted grade. The Court of Military Review affirmed the findings and the sentence. 37 M.J. 787 (1993).

GRANTED ISSUE[1]

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO DISMISS ALL CHARGES WITH PREJUDICE DUE TO LACK OF A SPEEDY TRIAL

2. We hold the military judge did not abuse his discretion in failing to dismiss all charges with prejudice due to lack of speedy trial under RCM 707, Manual for Courts-Martial, United States, 1984 (Change 5).

3. On the evening of March 1, 1990, eight members of the United States Coast Guard Cutter HAMILTON, including appellant, rented a room at the Red Roof Inn in Philadelphia, Pennsylvania, for a going-away party for a fellow Coast Guardsman who was being transferred. The HAMILTON was undergoing repair work in Philadelphia. The group consisted of seven men and one woman, the woman being Seaman L. She became intoxicated after consuming almost a fifth of liquor. Several members of the group, including appellant, took advantage of her condition to engage in acts of sexual misconduct. The witnesses to these events both at the party and afterwards were in Philadelphia on temporary duty from various parts of the country, including Hawaii, Washington State, Oklahoma, New Jersey, Massachusetts,

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[1] We also granted review of 2 other issues, 39 M.J. 428 (1994), which have been disposed of by *United States v. Carpenter*, 37 M.J. 291 (CMA 1993), *cert. granted sub nom. Ryder v. United States*, 63 U.S.L.W. 3498 (Jan. 6, 1995)(No. 94-431).

Virginia, as well as members of the HAMILTON, which was en route to its new homeport in Long Beach, California, from June 21 to July 25, 1991.

4. On June 25, 1991, charges were preferred against appellant for the following offenses:

(1) conspiring with Yeoman Martin R. Trujillo, Seaman Jose M. Collazo, and Seaman Charles A. Hokoana to rape, sodomize, and indecently assault Yeoman L.;

(2) conspiracy to obstruct justice by hindering the investigation of the rape, sodomy, and indecent assault of L;

(3) making a false official statement to Special Agent R. A. Carreiro that no one made any sexual advances against L at the Red Roof Inn in Philadelphia, Pennsylvania, on or about March 1, 1990;

(4) rape of L;

(5) forcible sodomy of L;

(6) indecent assault of L by inserting his finger into her vagina; and

(7) indecent assault of L by biting her about the neck, breast, and thighs.

5. Prior to arraignment (1), (4), and (5) were dismissed. Two accessory-after-the-fact specifications were added on November 18, 1991.

6. After an Article 39(a), UCMJ, 10 USC @ 839(a), session, the military judge on December 21 dismissed without prejudice the aforementioned charges and specifications preferred on June 25, 1991, against appellant because of a denial of a right to speedy trial as set forth in RCM 707. On December 27, 1991, additional charges were preferred against appellant for conspiracy to obstruct justice, making a false official statement, and indecent assault.

7. On February 7, 1992, another Additional Charge and 3 specifications of uttering bad checks were preferred; on March 13, 1992, a fifth Additional Charge and its specification were preferred alleging commission of an indecent act upon Seaman L. Appellant alleges that the indecent-act charge is in effect very similar to the indecent-assault charge which was dismissed without prejudice, Final Brief at 3, and we will treat it accordingly.

8. The prejudice alleged by the accused on appeal is that he was disenrolled from a service school, denied access to classified material, and was under great stress. Final Brief at 7.

DISCUSSION

9. While articulating an "abuse of discretion" standard in *United States v. Taylor*, 487 U.S. 326, 335 ¶12, 101 L. Ed. 2d 297, 108 S. Ct. 2413 (1988), the Supreme Court stated that "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Id.* at 336 ¶13. The Court continued: "Whether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise.... Factual findings of a district court are, of course, entitled to substantial deference and will be reversed only for clear error." *Id.* at 336 ¶14 and 337 ¶16. But the appellate court is to apply the "particular factors" set forth in the statute. *Id.* at 336-37 ¶15.

10. The Speedy Trial Act (18 USC §§ 3161-62) requires a reviewing court to undertake "substantive scrutiny to ensure that the judgment is supported in terms of the factors identified in the statute." In assessing these factors, "the district court's judgment of how opposing considerations balance should not lightly be disturbed." 487 U.S. at 337 ¶16.

11. RCM 707 was based on ABA Standards, Speedy Trial (1978), *see* Drafters' Analysis, Manual, *supra* at A21-36, and is generally similar to 18 USC §§ 3161-62. The Rule was designed to ensure speedy-trial protections in addition to those granted by the Sixth Amendment, Due Process Clause of the Fifth Amendment, and Article 10, UCMJ, 10 USC § 810. *United States v. Vogan*, 35 M.J. 32, 33 ¶5 (CMA 1992). In *United States v. Kossman*, 38 M.J. 258, 262 ¶21 (CMA 1993), relying on Article 10, we set forth a "reasonable diligence" standard, citing *United States v. Tibbs*, 15 USCMA 350, 353, 35 CMR 322, 325 ¶8 (1965). But *Kossman* is not applicable here because there was no pretrial restraint of appellant.

12. This case marks the first time this Court has addressed the 1991 change to RCM 707 allowing dismissal without prejudice. That version of RCM 707(d) provides:

> A failure to comply with the right to a speedy trial will result in dismissal of the affected charges. This dismissal will be with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a reprosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

13. This provision is similar to 18 USC § 3162(a)(2) of the Federal Speedy Trial Act, which reads:

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice....

14. One of the differences between the Speedy Trial Act and RCM 707 is that the factor of "prejudice to the accused resulting from the denial of a speedy trial" set out in the Rule is not enumerated in the Speedy Trial Act. However, in *United States v. Taylor*, 487 U.S. at 333-34 ¶10, the Court pointed out that the legislative history reveals that prejudice to the accused is a factor to be taken into account.

15. In assessing whether there has been a violation of the Sixth Amendment right to a speedy trial, courts examine the "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530 ¶24, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972). In contrast to the Speedy Trial Act, RCM 707(d) explicitly provides that if the judge does find a violation of the Sixth Amendment right to a speedy trial, the sole remedy is dismissal. *See United States v. Strunk*, 412 U.S. 434, 37 L. Ed. 2d 56, 93 S. Ct. 2260 (1973). Neither the dismissal with prejudice nor without prejudice has a "priority" in the Speedy Trial Act. *United States v. Taylor*, 487 U.S. at 334 ¶11

16. In determining whether the motion should have been granted with prejudice, the Supreme Court announced that it would examine the following factors: "truly neglectful" government "attitudes"; intentional versus "isolated unwitting violations"; excuses for the delay; and responsibility for the delay. *Id.* at 338-39 ¶18. The Federal Courts have looked at

similar factors, such as "intentional dilatory conduct," *United States v. Kottmyer*, 961 F.2d 569, 573 ¶18 (6th Cir. 1992); a "pattern of neglect," *id.* at 573 ¶18 and *United States v. Giambrone*, 920 F.2d 176, 182 (2d Cir. 1990); and simple inadvertence, *United States v. Wright*, 303 U.S. App. D.C. 352, 6 F.3d 811, 814 ¶12 (D.C. Cir. 1993).

17. A review of the record reveals that the 176-day delay in this case was not due to "intentional dilatory conduct" on the part of the Government. After the party at the Red Roof Inn, the witnesses and suspects were spread throughout the world, including California, Hawaii, Oklahoma, and many places on the East Coast. In fact, prior to preferral of charges appellant's ship sailed from Boston to Long Beach, California, making potential witnesses and the co-accuseds unavailable. Twenty-eight days of the delay were due to finding a "suitable" investigating officer for a multi-party Article 32, UCMJ, 10 USC § 832, investigation. This involved contacting 7 different Coast Guard legal offices to find an Article 32 investigating officer. Another delay between August 26 and September 19, 1991, was to await the trials of the co-accused to obtain further evidence for appellant's trial. Certainly it is reasonable for the Government to decide in which order defendants will be tried. *Cf. United States v. Facey*, 26 M.J. 421 (CMA 1988); *United States v. Grom*, 21 M.J. 53, 57 ¶14 (CMA 1985), *cert. denied*, 475 U.S. 1083, 89 L. Ed. 2d 718, 106 S. Ct. 1462 (1986).

18. Appellant demanded a speedy trial on August 27, 1991, after a multi-party Article 32 investigation. The military judge evaluated the seriousness of the offenses; the facts and circumstances surrounding the request for dismissal; the reasons for the delays; and the prejudice to the accused. He found very little prejudice to appellant, *i.e.*,

disenrollment from school, inability to work due to withdrawal of his security clearance, and possible stress. There was no indication of the slightest impact on the right to a fair trial.

19. Based on these facts, we hold that the military judge did not abuse his discretion in failing to dismiss the charges with prejudice.

The decision of the United States Coast Guard Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX and GIERKE concur.

WISS, Judge (concurring in the result):

20. The majority asserts: "A review of the record reveals that the 176-day delay in this case was not due to 'intentional dilatory conduct' on the part of the Government." 41 M.J. at 422. It then notes that this record reveals that there was difficulty in contacting potential witnesses and co-accuseds who had "spread throughout the world" after the party; difficulty in finding a suitable Article 32, Uniform Code of Military Justice, 10 USC § 832, officer; and the need to obtain further evidence for appellant's trial by waiting for the trial of co-accused. My own review of the record, however, does not support the implication that such facially understandable explanations caused the delay here, so I cannot join in the majority opinion.

21. The party at which these offenses allegedly occurred was on *March 1, 1990*, in Philadelphia, where the revelers' ship was in overhaul. Investigation of this event began at least as early as April 1990. On June 21, 1991, nearly 16 months after the party, the ship left the east coast, and it arrived at its new homeport of Long Beach, California, on

July 25, 1991. The original charges had been preferred against appellant, in the interim, on June 25, 1991, thereby starting the 120-day clock of RCM 707(a)(1), Manual for Courts-Martial, United States, 1984.

22. On *September 9, 1991*, the Government asked for and received the convening authority's retroactive excusal for delay since June 25. The military judge, however, ruled that excusing this delay was an abuse of the convening authority's discretion in violation of RCM 707(c), which only provides for "prospective grants of pretrial delay" in all cases tried after July 6, 1991. Exec. Order No. 12767, 56 Fed. Reg. 30299 (1991). *See United States v. Carlisle*, 25 M.J. 426 (CMA 1988). As well, this request and grant of excusal was *ex parte*--another violation of RCM 707 found by the military judge. *See United States v. Duncan*, 38 M.J. 476, 479 ¶ 15 (CMA 1993).

23. It was during this period of delay that the alleged difficulties arose to which the majority points. Upon a closer look, however, those difficulties do not appear to have been so overwhelming. As mentioned earlier, the investigation into the events at the party had begun in April 1990; in fact, the Government had given immunity to one of the attendees and had interviewed him in November 1990. Further, the witnesses and co-accused numbered only a total of eight, and all were servicemembers. In this context, it is not readily apparent that the task of locating and interviewing these eight people was so imposing, as the majority implies. As to the tactical decision to try appellant after 2 of his co-accused, I note simply that neither testified at appellant's court-martial when it finally took place in March 1992.[2]

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[2] The military judge dismissed the relevant charges without prejudice to the Government to renew them in December 1991. Ironically, then,

24. Thus, the delay from *September 23 until November 18, 1991*, is wholly unexplained; the prosecutor simply asserted that he believed that the convening authority had relieved the Government of accountability for 91 days of delay on September 9 (77 days as of that date and 14 more prospectively)--the implication being that trial counsel believed (erroneously, it turned out) that he had time to burn.

25. Accordingly, far from being a picture of orderly process interrupted only by reasonable and understandable difficulties, as painted by the majority, this case is a not pretty picture of a lackadaisical approach to military justice. I do not dissent from the majority's disposition here only because appellant is unable to point convincingly to substantial prejudice suffered as a result. *See* RCM 707(d); *United States v. Grom*, 21 M.J. 53, 57 ¶¶ 16-17 (CMA 1985), *cert. denied*, 475 U.S. 1083, 89 L. Ed. 2d 718, 106 S. Ct. 1462 (1986). The Government has dodged a bullet.

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[2] Cont. appellant's motion to dismiss charges due to unreasonable pretrial delay only resulted in 3 more months of delay.

APPENDIX C

UNITED STATES COAST GUARD
COURT OF MILITARY REVIEW

Washington, DC

UNITED STATES

v.

Jon E. Edmond
Fire Control Technician Third Class, U.S. Coast Guard

CGCM 0063

Docket No. 999

25 June 1993

[37 M.J. 787]

General Court-Martial convened by Commander, U.S. Coast Guard Maintenance and Logistics Command Pacific, Alameda, California. Tried at the Office of the Commander, Maintenance and Logistics Command Pacific, Alameda, California, on 18 December 1991, and 23-27 March 1992.

Military Judge: CAPT Douglas A. Smith, USCG
Trial Counsel: LCDR C. H. Allen, USCG
Detailed Defense Counsel: CAPT G.J.D. Dean, USMC
Assistant Defense Counsel: LT J. R. James, JAGC, USNR
Appellate Defense Counsel: LCDR Allen Lotz, USCG
Appellate Government Counsel: LT Garland M. Walker, USCGR

BEFORE
PANEL FOUR
BAUM, BASTEK, AND EDWARDS
Appellate Military Judges

Edwards, Judge:

Contrary to his pleas, Appellant was convicted by officer and enlisted members of being an accessory after the fact to an attempted sodomy committed by a shipmate, committing an indecent act with a different shipmate, and dishonorably failing to maintain sufficient funds in his checking account to honor each of three personal checks, in violation of Articles 78 and 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 878 and 934 (Supp. II 1990). The convening authority approved the adjudged sentence of reduction to pay grade E-1, forfeiture of all pay and allowances, confinement for one year, and a bad conduct discharge.

Appellant submits ten assignments of error, six of which merit discussion. Those six follow: Assignment I asserts that the Military Judge erred in not dismissing all charges with prejudice for lack of a speedy trial. Assignment II asserts that the Military Judge erred in denying a defense motion which sought his disqualification. Assignment III asserts that the Military Judge erred in refusing to dismiss Additional Charge V and its specification (indecent act with another), when it was multiplicious for pleading purposes with Additional Charge III and its specification (indecent assault). Assignment IV asserts that the three specifications of failing to maintain sufficient funds fail to state offenses. Assignment V asserts that the Military Judge erred in admitting irrelevant evidence of the post-offense status of Appellant's checking account. Assignment VI asserts that the evidence was not

sufficient to prove beyond a reasonable doubt that Appellant was guilty of dishonorably failing to maintain sufficient funds in his checking account.

The case having been fully briefed and argued, we now affirm.

I.

FACTS

The most serious charges arose from an incident which occurred on 1 March 1990. Appellant was assigned to USCGC HAMILTON (WHEC-715), which was undergoing a period of yard availability in Philadelphia, Pennsylvania. A going-away party was held in a local motel for one of Appellant's shipmates who was being transferred. During the party, Seaman (SN) L, a woman who served with Appellant in the cutter's deck force, consumed so much alcohol that she became quite ill. Several of the party-goers, including Appellant, took advantage of SN L's inebriated and sickened condition to engage in acts of sexual misconduct. Ultimately, the incident came to the attention of Coast Guard authorities, was investigated, and led to charges. Following dismissal of most of the charges by the Military Judge at the initial session of Appellant's trial, see Part II infra, Appellant issued three personal checks which were dishonored and thereafter served as the basis for an additional charge when the trial reconvened.

II.

SPEEDY TRIAL

Charges under Articles 81, 107, 120, 125, and 134, UCMJ, initially were preferred against Appellant on 25 June

1991, and he was informed of them on 5 July 1991. *See* Rules for Courts-Martial [hereinafter R.C.M.] 308. No pretrial restraint, R.C.M. 304, was imposed. An additional charge under Article 78, UCMJ, containing two specifications, was preferred on 18 November 1991. An Article 32, UCMJ, hearing was conducted on 18 and 19 November 1991. Thereafter, the Convening Authority referred charges under Articles 78, 81, 107, and 134, UCMJ, to a general court-martial. Trial commenced on 18 December 1991. Prior to arraignment,[1] Appellant moved to

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[1] R.C.M. 904 provides, in pertinent part, that arraignment "shall consist of reading the charges and specifications to the accused and calling on the accused to plead. The accused may waive the reading." The Discussion following R.C.M. 904 notes that "arraignment is complete when the accused is called upon to plead; the entry of pleas is not part of the arraignment."

During the first session of Appellant's trial on 18 December 1991, the Military Judge stated to Appellant:

> Now Petty Officer Edmond, I'm about to ask you how you plead to the Charges and Specifications. However before receiving pleas, I must advise you that any motions to dismiss any charge or to grant any other relief should be made at this time. I understand that Captain Dean [Detailed Defense Counsel] has several motions to make at this point. You may proceed.

Record at 20.

Thereafter, motions were made and argued extensively. However, Appellant never actually was asked to plead nor did he do so on that date. Accordingly, there was no arraignment on 18 December 1991.

Trial reconvened on 23 March 1992. In the meantime, as discussed infra, the Military Judge had dismissed the charges under Articles 81, 107, 120, 125, and 134, which were the ones preferred on 25 June 1991. The additional charge under Article 78, UCMJ, which had been preferred on 18 November 1991, was not affected. New charges had been preferred and referred to the same court-martial. The Military Judge correctly

dismiss all of the charges on the basis of denial of his right to a speedy trial.

In his Essential Findings and Ruling on Speedy Trial Motion, dated 21 December 1991, the Military Judge found the government accountable for 161 days of the 176 days which had elapsed since charges originally had been preferred on 25 June 1991. Accordingly, he also found that the government had violated R.C.M. 707(a)(1), which provides that an accused is to be brought to trial within 120 days of the preferral of charges. He did not find a violation of Appellant's right to a speedy trial under either the Sixth Amendment to the Federal Constitution or Article 10, UCMJ. Pursuant to R.C.M. 707(d), the Military Judge dismissed the charges preferred on 25 June 1991 (Articles 81, 107, 120, 125, and 134, UCMJ), without prejudice to the government's right to reinstitute proceedings against Appellant for the same offenses. He denied that portion of the motion seeking dismissal of the additional charge under Article 78, UCMJ.

Appellant argues first that the Military Judge should have dismissed the additional charge under Article 78, UCMJ,

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[1] Cont. explained to Appellant that he could not be tried on the new charges without his consent. See R.C.M. 601(e)(2). Appellant so consented and was arraigned properly on all of the charges, including the charge under Article 78, UCMJ.

Between 18 November 1991 and Appellant's arraignment on 23 March 1992, 126 days elapsed. As he had not been arraigned at the 18 December 1991 trial session, a motion for dismissal of the Article 78, UCMJ, charge might have been made by Appellant under R.C.M. 707(a)(1) and 707(b)(1). None was. It appears that no one realized that Appellant had not been arraigned at the session on 18 December 1991, and that all parties acted as though he had pled not guilty. In any event, while not condoning the failure to hold a proper arraignment, we find that Appellant has waived this issue. R.C.M. 905(e) and 907(b)(2).

because the government had the information necessary to prefer that charge when he was charged with the other offenses on 21 June 1991. Appellant cites *United States v. Boden*, 21 M.J. 916 (A.C.M.R. 1986), and *United States v. Honican*, 27 M.J. 590 (A.C.M.R. 1988), in support of his position. Both *Boden* and *Honican* are inapposite. In each, the accused was in pretrial confinement for other offenses when an additional charge was preferred. Under the version of R.C.M. 707(d) then in effect and *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971), the Army Court of Military Review held that, as a consequence of being in pretrial confinement, the 90-day period for bringing the accused to trial on the additional charge began when the government possessed "substantial information on which to base preferral of that charge." *United States v. Boden*, 21 M.J. at 918. Unlike either of the accused in *Boden* and *Honican*, Appellant in this case never was placed in pretrial confinement. Accordingly, the condition predicate for starting the speedy trial clock, i.e., substantial information *while Appellant was in pretrial confinement*, never was satisfied.

Appellant next contends that, in dismissing the 21 June 1991 charges without prejudice, rather than with prejudice, the Military Judge abused his discretion because he did not weigh properly the factors listed in R.C.M. 707(d). Appellant also contends that, in any event, the lack of a speedy trial violated his Sixth Amendment rights.

Both the government and Appellant agree that the current version of R.C.M. 707 applies. It was included in Executive Order 12767 issued by the President on 27 June 1991 and published at 56 Fed. Reg. 30284, which subsequently was published as Change No. 5 to the Manual for Courts-Martial, United States 1984 [hereinafter MCM] on

15 November 1991. Section 4.d. of the Executive Order provides that the amended R.C.M. 707 was to apply "only to cases in which arraignment occurs on or after 6 July 1991." As arraignment occurred on 23 March 1992, *see* n.1 *supra*, we also agree that the current version applies.

R.C.M. 707(d) now provides:

> Remedy. A failure to comply with the right to a speedy trial will result in dismissal of the affected charges. This dismissal will be with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a reprosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

Recognizing that, if he found a violation of Appellant's constitutional right to a speedy trial, he would have no alternative but to dismiss with prejudice any of the affected charges, the Military Judge first conducted a "Sixth Amendment Speedy Trial" analysis. Citing *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), *United States v. Grom*, 21 M.J. 53 (C.M.A. 1985), and *United States v. Johnson*, 17 M.J. 255 (C.M.A. 1984), the Military Judge addressed four factors, *viz.*, length of delay, reason for delay, Appellant's assertion of his right to a speedy trial, and prejudice to Appellant.

The Military Judge found the length of delay, 176 days, while beyond the 120-day standard of R.C.M. 707, to be

"within the 'neutral' range for determining a 6th Amendment speedy trial violation."

With respect to reasons for delay, the government offered several, including unavailability of witnesses due to a coast-to-coast change of homeport of Appellant's cutter and the earlier trial of two co-accused in order to make them available to testify at Appellant's trial. Additionally, consistent with past practice under the former version of R.C.M. 707, the Convening Authority had authorized several periods of pretrial delay, but did so retroactively. The Military Judge ruled that the current version of R.C.M. 707(c) precludes retroactive approval of periods of delay. Nevertheless, he found no bad faith on the part of government counsel because "this issue was not clearly settled" when the government counsel obtained retroactive approval for periods of delay from the Convening Authority. Accordingly, the Military Judge found that this factor "weighed in favor of the government in [his] balancing."

Appellant did demand a speedy trial on 27 August 1991 and the Military Judge found this factor to favor Appellant's position.

Finally, with respect to the fourth factor, prejudice to Appellant, the Military Judge found only "slight" prejudice, because Appellant had not been restrained in any fashion, there was no evidence that his defense had been hindered by the delay, he had continued to receive pay and allowances, and there was no significant evidence that Appellant's anxiety or stress exceeded that of any other accused facing similar charges. Appellant's security clearance had been withdrawn, but he had been allowed to perform the normal duties of a person in his rating who had lost such a clearance.

Upon weighing all of these factors, the Military Judge "[found] them less compelling than the factors evaluated by

the Court of Military Appeals in [*United States v. Grom, supra*], where the court held that there was no denial of the 6th Amendment right to a speedy trial." Accordingly, the Military Judge found no Sixth Amendment violation.

We concur with the Military Judge's reasoning and his conclusion. Applying the abuse of discretion standard of *United States v. Travers*, 25 M.J. 61 (C.M.A. 1987), we find that he did not abuse his discretion in denying that portion of Appellant's speedy trial motion seeking dismissal under the Sixth Amendment.

Turning to the issue of dismissal with or without prejudice, we note that the Military Judge's essential findings also addressed each of the four specially listed factors in R.C.M. 707(d). With respect to the first, seriousness of the offenses, the Military Judge found that Appellant had been charged with what clearly were serious offenses. As to the second, the facts and circumstances of the case that led to dismissal, the Military Judge found no evidence of intentional government noncompliance with R.C.M. 707, but instead a "good faith, though misguided, reliance on an erroneous interpretation of [the] 'new' RCM 707." With respect to the third factor, the impact of a reprosecution on the administration of justice, the Military Judge found this to be "neutral," since dismissal with prejudice would not have contributed to a better or fairer administration of military justice within the Coast Guard. Finally, the Military Judge found that the fourth factor, prejudice to the accused, favored dismissal without prejudice since Appellant had not been harmed by the 41-day length of the R.C.M. 707 violation. Again, we find that the Military Judge did not abuse his discretion in deciding to dismiss without prejudice.

III.

DISQUALIFICATION OF THE MILITARY JUDGE

Appellant asserts that, pursuant to R.C.M. 902(a) and (b)(1), the Military Judge should have recused himself in order to avoid the "appearance of impartiality" (sic), because he had served as the military judge in the courts-martial of three of Appellant's co-accused.

At trial, Appellant twice challenged the Military Judge for cause, at the initial session on 18 December 1991, and the second session on 23 March 1992. In both instances the Military Judge denied the challenge. He explained that he had no knowledge of any of the facts concerning any of the accused except that which was gained during his participation in their earlier trials. Anything which he had heard in a prior case he always disregarded in a subsequent trial, and he intended to do the same in Appellant's trial. Finally, the Military Judge stated that any determination he might make with respect to Appellant would be based entirely upon evidence presented at his own trial.

Appellant argues for reversal because of the Military Judge's acceptance of a guilty plea by one of Appellant's co-accused to a charge of accessory after the fact to indecent assault by Appellant, and because of the "chilling effect" upon that same co-accused's testimony purportedly caused by the presence on the bench of the same military judge who had tried that co-accused.

The facts in this case most closely resemble those found in *United States v. Oakley*, 33 M.J. 27 (C.M.A. 1991). In *Oakley*, the military judge presided at a trial with members after he previously had presided at the trials of two of the accused's "alleged cohorts." *Id.* at 33. One had pled guilty in a trial by military judge alone, and the other had pled guilty in a trial with members. The Court of Military Appeals held that the military judge was not required to recuse himself

where there was no "affirmative indication in the record that [the accused] would have withdrawn that request [for trial with members] if his recusal motion had been granted," *id.* at 34, the military judge's findings in the earlier trials were based upon evidence presented solely in those trials, and the military judge clearly demonstrated his intention and ability to disregard that other evidence and rely strictly upon evidence presented in the accused's trial.

With respect to forum, during voir dire of the Military Judge at the initial trial session, he asked Detailed Defense Counsel whether Appellant was considering trial by military judge alone. Defense Counsel declined to answer the question at that time. After the challenge against the Military Judge had been denied the first time, Appellant elected trial with members. Neither Appellant nor Detailed Defense Counsel made any statement to the effect that the denial of the challenge had led to the decision to go forward with members. Accordingly, as in *Oakley*, there does not appear to be any basis for concluding that the denial of the challenge to the Military Judge for cause had any effect on Appellant's choice of forum.[2]

We also conclude that there is no basis for finding that the Military Judge was any less than completely forthright in stating his belief that he could hear Appellant's case fairly and without regard to the earlier trials. This clearly is not a case in which the Military Judge had "formed an intractable opinion as to the guilt of the accused." *United States v. Winter*, 35 M.J. 93, 95 (C.M.A. 1992). Similarly, as

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[2] Even if Appellant had stated that the Military Judge's denial of his challenge had led him to elect trial by members, we are not convinced that this single change in the facts of this case would necessitate altering our decision on the issue of the Military Judge's disqualification.

"fundamental legal principles require judges to decide cases based on evidence presented at trial," *id.*, the Military Judge's assurances that he would do precisely this must be accorded great weight. We find no merit in Appellant's "chilling effect" argument because there is no evidence the Military Judge's participation in earlier trials had any untoward effect upon witnesses in Appellant's trial. This argument also fails because it is presumed that counsel had access to earlier testimony and would themselves have been aware of and quick to point out any witness inconsistencies from one trial to the next.

IV.

MULTIPLICITY OF CHARGES

The single specification under Additional Charge III alleges that Appellant committed an indecent assault under Article 134, UCMJ, against Yeoman Third Class L [SN L apparently had been advanced to Yeoman Third Class (YN3) by the time charges were preferred]. The single specification under Additional Charge V alleges the same facts as Additional Charge III but charges that Appellant committed an indecent act under Article 134, UCMJ, with YN3 L.

At trial, Detailed Defense Counsel moved to dismiss Additional Charge V as multiplicious with Additional Charge III, contending that the alleged indecent act was a lesser included offense of the alleged indecent assault. The government responded that Additional Charge V alleged a consensual indecent act while Additional Charge III alleged a nonconsensual indecent assault; that the case law was unclear whether a consensual indecent act could be found to be a lesser included offense of indecent assault; and that, based upon exigencies of proof, the members might find that SN L

had consented to the acts allegedly committed by Appellant, rather than that she had been the victim of them.

The Military Judge denied Appellant's motion. He ruled that, although Additional Charge V was a lesser included offense of Additional Charge III, there was not an unreasonable multiplication of charges and that submitting both charges to the members as drafted would be clearer and less likely to lead to confusion on their part. He later instructed the members twice about the distinctions between the two charges, both when he first informed them about the charges and again prior to deliberations. In giving the first set of instructions to the members, the Military Judge stated that Additional Charge V was a lesser included offense of Additional Charge III. He repeated this statement in the latter instructions and he also explained to the members that they were to vote on Additional Charge III first and to consider Additional Charge V only if they acquitted Appellant of Additional Charge III. In the event they convicted him of Additional Charge III, the members were neither to vote nor make any finding with respect to Additional Charge V. We test the denial of Appellant's motion to dismiss for abuse of discretion. *United States v. Howard*, 24 M.J. 897 (C.G.C.M.R. 1987).

The Discussion following R.C.M. 307(c)(4) provides that

> what is substantially one transaction should not be made the basis for an unreasonable multiplication of charges. . . . There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses. In no case should both an offense and a lesser included offense thereof be separately charged.

For the purpose of deciding this issue, we shall assume that the Military Judge was correct in treating the alleged indecent

acts charge as a lesser included offense of the indecent assault charge. *See* ¶ 63d.(2), Part IV, MCM.

The Military Judge made it as clear as possible to the members that the two charges grew out of one set of alleged circumstances, that the only significant distinction between them was that of consent on the part of SN L, and that they could not convict Appellant of both charges, although they could acquit him of both. The fact that the members acquitted Appellant of Additional Charge III but convicted him of Additional Charge V lends credence to our belief that the members did understand and follow the Military Judge's instructions. We also are satisfied that allowing the members to consider both charges in the order in which he instructed did help to avoid confusion. In these circumstances, we find no abuse of discretion.

V.

THE DISHONORED CHECK OFFENSES

Appellant originally was charged under Article 123a, UCMJ, with one specification each of making three checks with intent to defraud. A copy of the Charge Sheet was served properly on Appellant prior to trial. Before arraignment, each specification was amended to charge a violation of Article 134, UCMJ, for making and uttering the checks and thereafter dishonorably failing to maintain sufficient funds for payment upon presentation. Each specification was amended by the Trial Counsel who made "pen and ink" changes. In so doing, however, he failed to include the word, "dishonorably," in the amended specifications. Appellant now maintains that each specification fails to state an offense and that his conviction under the charge and each specification should be set aside.

"A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3). *See also United States v. Sell*, 3 U.S.C.M.A. 202, 11 C.M.R. 202 (1953). Appellant does not contend that the original Article 123a, UCMJ, specifications were drafted incorrectly, and our own review confirms that each satisfies the requirements of R.C.M. 307(c)(3).

¶ 49d.(1), Part IV, MCM, provides that the making and uttering of a check and dishonorably failing thereafter to maintain sufficient funds is a lesser included offense under Article 123a, UCMJ. It is clear from the record that Appellant had been apprised properly of the greater offenses, *i.e.*, those alleged under Article 123a. It also is apparent that he had been involved in informal negotiations which led to the government's decision to charge him with only the lesser included offenses under Article 134, UCMJ. In such circumstances, we have no trouble concluding that Appellant has suffered no harm and is not entitled to relief for the government's failure to include the word, "dishonorably," in the three Article 134, UCMJ, specifications. *Cf. United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986) (An unauthorized absence specification missing the words, "without authority," is defective, although not fatally so).

Appellant next contends that the Military Judge erred in admitting Prosecution Exhibit 10, a copy of three bank statements for his account dated 17 December 1991, 17 January 1992, and 18 February 1992, respectively. He argues that, inasmuch as the three dishonored checks were issued on 3, 9, and 12 January 1992, and presented for payment between those dates and 14 January 1992, the December and February statements should have been excluded under Rule 402, Military Rules of Evidence [hereinafter Mil.R.Evid].

Appellant also argues the February statement should have been excluded under Mil.R.Evid. 403 and 404(b) because it indicates the existence of other dishonored checks.

In attempting to prove Appellant's guilt of the three dishonored check offenses, the government was required to demonstrate that his failure to place or maintain sufficient funds in his checking account "was dishonorable." ¶ 68b.(4), Part IV, MCM. "Mere negligence in maintaining one's bank balance is insufficient for this offense, for the accused's conduct must reflect bad faith or gross indifference in this regard." ¶ 68c., Part IV, MCM.

The Military Judge admitted Prosecution Exhibit 10 over defense objection.[3] In so doing, he stated that "I find that the February statement is probative of the Accused's attitude toward his . . . checking account during the period in question and is probative of whether or not that attitude was grossly indifferent or grossly negligent or whether or not his conduct with respect to that bank account was dishonorable." Record at 106, Vol. III. Later, he gave a limiting instruction on the

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[3] The record is unclear as to the precise nature of Appellant's objections to admission of this exhibit at trial. The defense first made known its objection to the exhibit during a session conducted pursuant to Article 39(a), UCMJ. The next morning, an "off the record" conference was conducted by the Military Judge pursuant to R.C.M. 802. Back on the record, the Military Judge later alluded to this conference and Appellant's stated intention to object to admission of Prosecution Exhibit 10, but did not state the basis for the objection. It does appear that Appellant's sole objection was to the February bank statement and that it was based upon Mil.R.Evid. 404(b). Were this the case, we would deem waived Appellant's current assertions under Mil.R.Evid. 402 and 403 and his objection to the December statement. As it is not certain, we shall treat this issue as though Appellant did object to both the December and February statements and did cite all three Rules of Evidence at the time he initially objected.

use of Prosecution Exhibit 10, specifically admonishing the members to use the February statement

> for the limited purpose of its tendency, if any, to show the accused's state of mind or attitude with respect to the handling of his checking account transactions.
>
> . . . .
>
> You may not, and I repeat, you may not, use this evidence to conclude that the accused somehow is a bad person, and that, therefore, he must be guilty of these offenses that are charged with respect to the bad checks, or that he is a bad person and therefore he must be somehow guilty of the other offenses with which he is charged.

Record at 135–136, Vol. IV.

We have reviewed the December, January, and February statements ourselves. The December statement reveals one instance when Appellant overdrew his account by issuing a check when he had insufficient funds. The February statement reveals that Appellant not only overdrew his account, but that he had four "returned check charges" between 24 and 30 January 1992. The January statement, which Appellant does not contest, reveals that Appellant had four other "returned check charges," apparently including the three for which he was convicted.

We do not find that the Military Judge abused his discretion in admitting all three statements. The December statement was at least minimally relevant under Mil.R.Evid. 402 to demonstrate that Appellant had issued at least one check which would have overdrawn his account but for the "overdraft protection" which his bank then was willing to extend to him. The February statement was relevant in showing a continuing pattern, which first began in late

December of 1991, of Appellant's issuing checks without having sufficient funds to cover them. Under Mil.R.Evid. 404(b), the February statement was admissible to demonstrate the "absence of mistake or accident" on the part of Appellant, as well as his apparent lack of concern about maintaining a sufficient balance in his checking account. *Cf. United States v. Ferguson*, 29 M.J. 559 (A.F.C.M.R. 1989) (In circumstances similar to these, "'attitude' becomes one of the 'other purposes' for which uncharged misconduct is admissible under Mil.R.Evid. 404(b)." *Id.* at 561). Finally, under Mil.R.Evid. 403, we do not believe that the probative value of Prosecution Exhibit 10 was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Appellant's final assertion with respect to the three dishonored check charges is that the government failed to present adequate evidence to prove, beyond a reasonable doubt, two of the five elements of dishonorable failure to maintain sufficient funds, *viz.*, that his failure to maintain sufficient funds was dishonorable, ¶ 68b.(4), Part IV, MCM, and that his conduct was prejudicial to good order and discipline, ¶ 68b.(5), Part IV, MCM. We disagree.

The test for legal sufficiency is whether, considering the evidence in a light most favorable to the government, the trier of fact rationally could find the existence of every element of the alleged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for our not having observed the witnesses personally, we are convinced of Appellant's guilt beyond a

reasonable doubt. Article 66(c), UCMJ, 10 U.S.C. @ 866(c); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

The Navy–Marine Corps Court of Military Review recently had occasion to address the sufficiency of the evidence issue in two cases involving the failure to maintain sufficient funds. We find our sister Court's disscussions of the issues particularly instructive and helpful. *See United States v. Wright*, (N.M.C.M.R. Dkt. No. 91 0329 7 April 1993); *United States v. Hurko*, 36 M.J. 1176 (N.M.C.M.R. 1993).

> A charge of dishonorably failing to maintain funds requires some act of deceit, wilful evasion, bad faith, false promises, or other distinctly culpable circumstances showing a deliberate nonpayment or grossly indifferent attitude toward one's just obligations. The gist of the offense of dishonorably failing to maintain funds lies in the conduct of the accused after uttering the instrument, conduct which must reflect bad faith or gross indifference. (citations omitted).

United States v. Wright, supra, slip op. at 5.

In *Wright*, the Court set aside a guilty plea to an insufficient funds charge because the providence inquiry established that the accused, who knew at the time he issued the checks that he did not have sufficient funds, had intended to deposit money to cover them by the time of presentment to his bank. The Court went on to note that

> *Simple negligence, inadvertence or indifference in maintaining sufficient funds is not an offense in military law.* [The accused's] inability to cover the checks may have been caused by a negligent reliance on [an unnamed] source, not a dishonorable refusal to cover the checks, or even unforeseen events that could not

> reasonably have been foreseen. (citations omitted) (emphasis added).

Id. slip op. at 6.

In *United States v. Hurko*, the Navy–Marine Corps Court faced a similar situation involving the issuance of numerous checks over a short period of time, all of which were dishonored. In this case, however, the evidence established that the accused did have a named source who was supposed to have deposited funds into his account, *i.e.*, his wife. The Court set aside the findings of guilty of the first 20 dishonorable failure to maintain sufficient funds specifications, but affirmed 34 other similar specifications. The Court held that the accused's belief that his wife would deposit sufficient funds to cover the first 20 checks was "reasonable, and no evidence was introduced that challenged the reasonableness of his belief. . . . His blind reliance on [his wife was] . . . certainly careless and irresponsible but cannot be described as dishonorable." 36 M.J. at 1178.

In affirming the remaining specifications, the Court found it

> inconceivable that the [accused] could have believed that those subsequent checks would be covered. . . . Considering the sheer volume of checks written (36 for $ 3362.00) in a short period of time (26 days) and the absence of any possibility of a new source of funds to cover these checks, we find the evidence sufficient to prove that the [accused] wrote all [the remaining] checks . . . knowing they would not be honored and with intent to defraud.

Id. at 1179.

In the present case, the evidence reveals that Appellant had made an Automatic Teller Machine (ATM) inquiry on 26

December 1991, which advised him that he had $3.44 in his account. Between that date and 2 January 1992, $595.17 was deposited into his account, leaving a total of $598.61 available to be drawn against. Appellant issued ten checks totalling $559.53 and withdrew $188.00 from an ATM without having made any additional deposits. Three of these checks, each of which was dishonored, were the ones for which he was charged. The total of all the checks and withdrawals was $ 747.53. Accordingly, Appellant attempted to "overdraw" his account by $ 148.92. There was no evidence that Appellant's bank was willing to permit such a substantial overdrawing of his account. Appellant's only explanation at trial was that he believed he "did have money in there to cover it."

Unlike the situation in either *United States v. Wright* or *United States v. Hurko, supra*, Appellant could not have held a reasonable belief that all of the checks would be honored. At best, the most he might have hoped for was that some of them might not be presented for payment before he could make his next deposit. Such an attitude goes well beyond "simple negligence, inadvertence or indifference in maintaining sufficient funds," *United States v. Wright*, (N.M.C.M.R. Dkt. No. 91 0329 7 April 1993) unpublished slip op. at 6, and does reflect "bad faith or gross indifference in this regard." ¶ 68c., Part IV, MCM.

Appellant argues that, in any event, his conduct was not to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces. This argument is premised upon the testimony of the Exchange Officer at the Coast Guard Exchange where the three checks had been cashed, who did state that these were three of many which had been dishonored, Appellant ultimately made good on them, and returned checks were a normal part of doing

business. However, the Exchange Officer also testified that such dishonored checks create cash flow problems for the exchange, and, if never paid, decrease the profits of the Exchange and, ultimately, the amount which the Exchange can contribute to the Morale Fund. We are satisfied that this testimony adequately establishes both conduct to the prejudice of good order and discipline, ¶ 60c.(2)(a), Part IV, MCM, and conduct of a nature to bring discredit upon the armed forces, ¶ 60c.(3), Part IV, MCM. We reject Appellant's "cost of doing business" argument. It would, were we to agree with it, effectively allow an "open season" on the funds of the Coast Guard Exchange System.

Accordingly, we find the evidence legally and factually sufficient to support Appellant's convictions for dishonorably failing to maintain sufficient funds.

VI.

ACTION

The remaining asserted issues are resolved adversely to Appellant. We independently have reviewed the appropriateness of the sentence, *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982), and find it appropriate. Accordingly, the findings and the sentence, as approved below, are affirmed.

Chief Judge Baum and Judge Bastek concur.

APPENDIX D

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

USCA Dkt. No. 95-0941/CG
Crim. App. No. 1025

United States, Appellee

v.

Jake A. Lazenby (539-94-4217), Appellant

ORDER

On further consideration of the granted issue (43 MJ 422) in light of *United States v. Ryder*, 44 MJ 9 (1996), it is, by the Court, this 21st day of May, 1996,

ORDERED;

That the decision of the United States Coast Guard Court of Criminal Appeals is affirmed.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of the Court

APPENDIX E

UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

Washington, DC

UNITED STATES

v.

Jake A. Lazenby
Machinery Technician Third Class, U.S. Coast Guard

CGCMS 24080

Docket No. 1025

2 JUNE 1995

[42 M.J. 702]

Special Court-Martial convened by Commander, USCG Maintenance and Logistics Command Pacific. Tried at Coast Guard Maintenance and Logistics Command Pacific, Alameda, California.

Military Judge: CAPT Ronald C. Zabel, USCG

Trial Counsel: LT Robert S. Schuda, USCG

Defense Counsel: LCDR Hugh F. Sage, USCG

Appellate Defense Counsel: LCDR Allen Lotz, USCG

Appellate Government Counsel: LCDR Charles J. Bennardini, USCG

BEFORE
PANEL SIX
BAUM, BRIDGMAN, AND O'HARA
Appellate Military Judges

Baum, Chief Judge:

Appellant was tried by special court-martial judge alone. Pursuant to his pleas of guilty, entered in accordance with a pretrial agreement, he was convicted of the following offenses: one specification of larceny of various articles of military property over a period of time, of an aggregate value of at least $805, in violation of Article 121, UCMJ; and two specifications in violation of Article 134, UCMJ, one for wrongful receipt of a pair of night vision goggles, military property of the United States, of a value of about $5,000, and the other for wrongful receipt of a monocular night vision device, of some value, knowing it had been stolen. The judge sentenced Appellant to a bad conduct discharge, confinement for four months, forfeiture of $400 pay per month for four months, and reduction to pay grade E-2. The convening authority approved the adjudged sentence as authorized by the pretrial agreement.

Appellant's plea bargain permitted conditional pleas preserving the right to appeal the judge's rulings on motions to suppress evidence obtained from a search of quarters and derivative evidence. Having entered such pleas with appeal rights preserved, Appellant now assigns as error the judge's ruling denying, in part, the motion to suppress. As his second assigned error, Appellant asserts that this Court lacks jurisdiction because of service of civilian judges who purportedly have not been appointed in accord with the Appointments Clause of the Constitution. This assignment has been rejected numerous times based on *United States v.*

Carpenter, 37 M.J. 291 (C.M.A. 1993), petition for cert. filed, No. 93-676 (U.S. 29 October 1993). It is rejected again for the same reason. The first assignment remains to be addressed:

THAT THE MILITARY JUDGE ERRED BY DENYING, IN PART, THE DEFENSE MOTION TO SUPPRESS EVIDENCE OBTAINED FROM AN ILLEGAL SEARCH OF APPELLANT'S QUARTERS AND DERIVATIVE EVIDENCE OBTAINED AS A RESULT OF THAT SEARCH

Appellant contends that the search of his assigned quarters at Coast Guard Station Humbolt Bay, Samoa, California, was unlawful and that the evidence seized in that search, as well as any derivative evidence, should have been suppressed by the military judge. In support of this contention, Appellant argues that the official who authorized the search was not neutral and detached, as required, and that the search authorization was not based on probable cause. The authorizing official was a Coast Guard chief warrant officer, who, as the Commanding Officer of USCG Station Humbolt Bay, was responsible for the security and safety of quarters located there. He had no command authority over Appellant, who was attached to a Coast Guard cutter, but did exercise control over the quarters assigned to Appellant. This officer issued the search authorization on the basis of a written request and affidavit from a Coast Guard special agent investigating the suspected theft of night vision goggles from Appellant's cutter. That agent, who was well known by the commanding officer, presented the request and affidavit in person. After signing the authorization to search, the commanding officer accompanied the agent to the quarters and remained there throughout the search and seizure.

A. Impartiality Requirement For Officer Authorizing Search

Pursuant to Military Rule of Evidence (M.R.E.) 315(d)(l), and Article 9-A-3 of the Coast Guard's Military Justice Manual (MJM), commanding officers are empowered to authorize searches as long as they are impartial. Appellant challenges the impartiality of the Commanding Officer, Coast Guard Station Humbolt Bay, by asserting that he did not act in a neutral and detached capacity. In support of this contention, Appellant says that the commanding officer readily accepted the special agent's request for a search without questioning him or seeking guidance when this was the authorizing officer's first such search request. Appellant sees these actions as indication of a lack of neutrality.

Appellant also says that the action of the commanding officer in accompanying the agent to the scene "and his participation in the search itself destroy any illusion of impartiality." Appellant's Brief at p. 8. The Government does not address this specific assertion, but points out that the commanding officer was not involved in the theft investigation and had no personal motive to act other than impartially. Quoting from *United States v. Sloan*, 30 M.J. 741, 746 (A.F.C.M.R. 1990), the Government says, "He did not instigate the investigation or devise the plan that ensnared the Appellant." Government's Brief at p. 3.

The judge's findings accord with the views expressed by the Government. The judge found that there was no evidence of anything in the background of the commanding officer that would taint his neutrality, that he "had no prior or subsequent involvement with the investigation except for what transpired on the day of the search in question." R. 267. We agree. The evidence shows that the commanding officer did not know the accused, had no interest in the investigation, personal or otherwise, and was acting solely as the officer responsible for the quarters on his station.

The judge also found that the authorizing officer's actions by going to the room and witnessing the search did not in any way taint his neutrality. In this regard, M.R.E. 315(d) says that an otherwise impartial authorizing official does not lose that character merely because he or she is present at the scene of the search. The evidence indicates that, while the commanding officer remained at the scene for the entire procedure, it was essentially to observe that proper actions were being taken in quarters for which he was responsible. We, therefore, reject Appellant's characterization of that officer's involvement as one of participation in the search. His presence during the search did not reflect a lack of impartiality.

We also find it understandable that the commanding officer relied on the agent's affidavit and explanation in issuing the authorization to search, without questioning him at length. The commanding officer knew the agent personally and had confidence in his explanation, which set out all the necessary details. The commanding officer said that he asked enough questions to verify in his mind that the agent had the necessary information and that he "believed there was probable cause to go look in that area." R. 199. Nothing in his actions would cause us to conclude that he was anything but a neutral and detached official who acted impartially in the matter. There was a substantial basis for the judge's neutrality finding, and, considering the issue *de novo*, we reach the same conclusion.

As a separate matter, MJM, Article 9-A-3, recommends that commanding officers authorize searches based on probable cause only in the most exigent circumstances when resort to a military judge would likely result in harm or loss of evidence. This case was certainly not one of exigency. The ship was at sea en route to Alaska, with the accused aboard,

so there was no danger of his returning any time soon and disposing of the evidence. Moreover, there was no indication that a military judge was not available to act on a search request. No attempt was made by the agent to contact a judge and no guidance from a staff judge advocate was sought by the commanding officer nor, for that matter, were any steps taken to check the pertinent portions of the MJM.

Operating in this manner invites error. It increases the chances of an improper search and the violation of important individual rights. Departures of this kind from recommended procedures may also jeopardize the Government's case, with the possibility that time and resources invested in developing a prosecution will come to nought. Despite our criticism of the failure to follow the pertinent MJM provision, however, the seized evidence is still admissible. As MJM, Article 9–A–1a, makes clear: "Although the procedures set out herein should be followed as appropriate under [the] circumstances, deviations will not invalidate a search which would otherwise be valid." That leaves us with the remaining question, whether the requirement for probable cause was satisfied.

B. Probable Cause

M.R.E. 315(f)(2) says that: "Probable cause to search exists when there is a reasonable belief that the ... property ... sought is located in the place ... to be searched." *United States v. Lopez*, 35 M.J. 35, 38 (C.M.A. 1992), tells us that a determination in this regard should be based on the totality–of–the–circumstances test of *Illinois v. Gates*, 462 U.S. 213, 233 (1983), rather than the replaced informant–reliability and basis–of–knowledge test of *Aquilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). Appellant, while acknowledging the foregoing, also cites *United States v. Lopez, supra*, for the proposition that the

Aquilar–Spinelli test remains highly relevant in determining probable cause. He contends that there was no probable cause to support the search authorization in this case because the search request depended entirely on the statement of one person and that person's reliability was not considered by either the requesting agent or the authorizing officer.

The facts bearing on this issue are found in the investigating agent's affidavit supporting the search request and in his testimony and that of the commanding officer. The affidavit recounted the agent's investigation of a reported theft of night vision goggles from the USCGC Acushnet and noted interviews of personnel attached to the ship. One of those interviewed was a Seaman Hill, who, others opined, had stolen the goggles. That individual acknowledged temporarily taking a night vision device that he returned after a few days. He, and two others interviewed, stated that the device he took was different from the one sought by the agent.

The affidavit went on to say that on a day the agent was at home he received a telephone call from the ship's executive officer on the "MARSAT" telephone system while the ship was at sea destined for Kodiak, Alaska. In the phone call, the executive officer stated that one of those interviewed by the agent had volunteered that he had engaged the Appellant in a conversation about the investigation and that the Appellant said "he was considering coming forward about the night scope because he stole it and felt bad that SN Hill was being accused of this particular theft."

The Appellant was then reported to have said "that he did not know how to turn the night scope in because it was hidden in a locked duffle bag [sea bag] which was stored in his closet of his room at CG Station Humbolt." App. Exh. XII. The executive officer gave the agent the number of the

apartment assigned to Appellant and two others from the ship, along with information that there are no specific room assignments, but that most rooms inside the apartment are marked. This affidavit, as part of the request for authority to search, was presented to the commanding officer on the same day the call was received from the executive officer of the Acushnet. Noted in the affidavit also was the fact that the executive officer had been the agent's assistant branch chief in a former assignment and the agent clearly recognized the voice from numerous prior conversations.

Given these facts, the military judge concluded that the search authorization was based on probable cause. In reaching this conclusion he found, among other things, that the affidavit contained sufficient particular facts upon which to base a probable cause determination and that the commanding officer, in making that determination, reasonably relied on his prior dealings with the executive officer of the Acushnet and with the investigating agent. Two other factors properly bearing on this matter are the timeliness of the information provided and the relationship between the crime objects and the place to be searched. *United States v. Lopez*, 35 M.J. 35, 38 (CMA 1992). Both of these aspects were present here, with the request for search authorization conveyed to the commanding officer the same day the telephone call from the Acushnet executive officer was received and the place to be searched pinpointed precisely.

Nevertheless, Appellant argues that probable cause requirements were not met because the only evidence presented to support the search, in his view, was the statement of one individual recounting what purportedly was said by the Appellant, and the reliability of that individual was not considered by the agent and the commanding officer. Indeed, that statement did furnish the location of the item sought, but

there also was other evidence bearing on the decision to search. Investigative background was supplied which placed the reported statement in context and provided plausibility. Moreover, prior associations were such that queries and explanations concerning reliability could have been seen as superfluous.

From past dealings, the commanding officer had reason to consider the agent reliable, and both he and the agent knew the executive officer well enough to rely on his good judgment in assessing the credibility of the reported information. In this regard, we also note "the unique 'truth-telling effect' of an identified servicemember's giving information in the presence of a superior officer," as recognized in *United States v. Tipton*, 16 M.J. 283, 287 (CMA 1983). For all of these reasons we believe there was a substantial basis for the judge's probable cause determination. We have also assessed the evidence *de novo* and independently find to our satisfaction that there was probable cause to search Appellant's quarters and his locked sea bag. The assignment of error is rejected.

We have reviewed this record pursuant to Article 66, UCMJ, and have determined that the findings and sentence are correct in law and fact and should be approved. Accordingly, the findings and sentence, as approved below, are affirmed.

Judges Bridgman and O'Hara concur.

APPENDIX F

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

USCA Dkt. No. 95-0909/CG
Crim. App. No. 946

United States, Appellee

v.

Michael B. Leaver (022-46-8539), Appellant

ORDER

On further consideration of the granted issue (43 MJ 422) in light of *United States v. Ryder*, 44 MJ 9 (1996), it is, by the Court, this 21st day of May, 1996,

ORDERED;

That the decision of the United States Coast Guard Court of Criminal Appeals is affirmed.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of the Court

APPENDIX G

UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

Washington, DC

UNITED STATES

v.

Michael B. Leaver
Chief Warrant Officer, U.S. Coast Guard

CGCM 0032

Docket No. 946

21 April 1995

[42 M.J. 599]

BEFORE
PANEL TWO
BAUM, FEARNOW, AND O'HARA
Appellate Military Judges

General Court-Marital convened by Commander, First Coast Guard District, Boston, Massachusetts. Tried at the Office of the Commander, First Coast Guard District, Boston, Massachusetts from 5-7 September 1989.

Military Judge: CAPT Douglas A. Smith, USCG
Trial Counsel: CDR Michael A. Leone, USCG
Assistant Trial Counsel: LT Robert E. Korroch, USCG

Detailed Defense Counsel: LT Mark R. B. Stewart, USCGR

Appellate Defense Counsel: Dan R. Hyatt, Esquire

Appellate Defense Counsel: LCDR Allen Lotz, USCG

Appellate Government Counsel: LCDR Charles J. Bennardini, USCG

Per Curiam:

This is our third review of this case. Its history may be found in prior opinions of this Court and the U.S. Court of Military Appeals. *United States v. Leaver*, 40 M.J. 529 (CGCMR 1993); *United States v. Leaver*, 36 M.J. 133 (CMA 1992); *United States v. Leaver*, 32 M.J. 995 (CGCMR 1991). Those opinions reveal that we initially affirmed findings and sentence in 1991 after rejecting assignments of error that included allegations of inadequate trial representation. Thereafter, the Court of Military Appeals, finding prejudicial lack of post-trial representation in the period before the convening authority acted, returned the record for a new convening authority's action. Upon completion of that step, the record was forwarded to this Court and we returned it again to the convening authority to ensure proper consideration of all matters submitted in the accused's behalf. That has been accomplished.

After review of all defense submissions, and with appropriate advice from his staff judge advocate, the convening authority on August 18, 1994 approved a dismissal, five years confinement and total forfeitures, but suspended all forfeitures in excess of $2,293.40 per month effective 1 July 1991, pursuant to clemency action taken by the Secretary of Transportation on 26 August 1991. Twenty-nine days of *Allen* credit toward the sentence of confinement was also provided. Thereafter, the record was once again

referred to this Court for review on 13 September 1994. Four and a half months later, after obtaining two enlargements of time, civilian defense counsel submitted two summary assignments of error.

The first assigned error reasserts an assignment of ineffective trial representation, incorporating by reference the facts, argument, and conclusions presented in a brief of 31 August 1993. The second assignment submits an oft repeated summary contention that this Court lacks jurisdiction because of service of civilian judges who purportedly have not been appointed in accord with the Appointments Clause of the Constitution. This second assignment has been asserted in numerous cases and rejected in each instance based on *United States v. Carpenter*, 37 M.J. 291 (C.M.A. 1993), petition for cert. filed, No. 93-676 (U.S. 29 October 1993). It is rejected again for the same reason.

Appellant's other assignment concerning trial representation was raised and rejected the first time the case was before us. Our evaluation then of the trial record and defense counsel's affidavit explaining his actions convinced us that there was no merit to the claim of ineffective representation. The trial defense counsel's rationale for actions taken made sense to us then and they still make sense today, after consideration of all the matters presented in support of Appellant's contentions. We again find no merit to Appellant's assertion of ineffective trial representation. We have also reviewed this record again pursuant to Article 66, UCMJ, and have determined that the findings and sentence are correct in law and fact and should be approved. Accordingly, the findings and sentence, as approved and partially suspended below, are affirmed.

Chief Judge Baum and Judges Fearnow and O'Hara concur.

APPENDIX H

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

USCA Dkt. No. 95-0702/CG
Crim. App. No. 1039

United States, Appellee

v.

James A. Leonard (113-60-9998), Appellant

ORDER

On further consideration of the granted issue (43 MJ 169) in light of *United States v. Ryder*, 44 MJ 9 (1996), it is, by the Court, this 21st day of May, 1996,

ORDERED;

That the decision of the United States Coast Guard Court of Criminal Appeals is affirmed.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of the Court

APPENDIX I

UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

Washington, DC

UNITED STATES

v.

James A. Leonard
Subsistence Specialist Second Class, U.S. Coast Guard

CGCMG 0087

Docket No. 1039

9 MARCH 1995

[41 M.J. 900]

General Court-Martial convened by Commander, Coast Guard Pacific Area. Tried at Coast Guard Maintenance and Logistics Command Pacific, Coast Guard Island, Alameda, California, 13 June 1994.

Military Judge: CAPT Lane I. McClelland, USCG
Trial Counsel: LT S. P. McCleary, USCGR
Defense Counsel: LT T. K. Taira, USCGR
Appellate Defense Counsel: LCDR Allen Lotz, USCG
Appellate Government Counsel: LCDR John Koeppen, USCG

BEFORE
PANEL THREE
BAUM, BRIDGMAN, AND FEARNOW
Appellate Military Judges

Baum, Chief Judge:

Appellant was tried by general court-martial, judge alone. Pursuant to his pleas of guilty, entered in accordance with a pretrial agreement, he was convicted of one specification of committing an indecent act on a ten year old girl by rubbing the skin in her genital area with his hand, with intent to gratify his own sexual desires, in violation of Article 134, Uniform Code of Military Justice (UCMJ). The military judge sentenced Appellant to a bad conduct discharge, confinement for two years, and reduction to pay grade E-3. The convening authority approved the sentence as adjudged, but suspended the confinement in excess of eighteen months for a period of four years from the date of trial, as provided for in the pretrial agreement. Appellant has assigned three errors before this Court: (1) that the period of four years suspension is unreasonably long, (2) that an unsuspended bad conduct discharge is inappropriately severe punishment, and (3) that this Court lacks jurisdiction because of civilian judges on the Court who have not been appointed in accordance with the Constitution. The last assignment has been rejected numerous times based on *United States v. Carpenter*, 37 M.J. 291 (CMA 1993), petition for cert. filed, No. 93-676 (U.S. 29 October 1993), and is rejected again for the same reason. The other assignments will be addressed.

I

SUSPENSION OF CONFINEMENT FOR A PROBATIONARY PERIOD OF FOUR YEARS

a. Unreasonably Long Suspension Prohibited

Appellant points out that Article 60(c)(2) of the Uniform Code of Military Justice (UCMJ) authorizes the convening authority to suspend a sentence in whole or in part, with no restrictions stated, but that the President, in promulgating the Manual for Courts-Martial (MCM), has set a limitation on the period of suspension in Rule for Courts-Martial (RCM) 1108(d) by stating that it "shall not be unreasonably long." Additionally, RCM 1108(d) authorizes the Secretary concerned to further limit by regulations the period for which the execution of a sentence may be suspended. For the Coast Guard as noted by Appellant, the Secretary of Transportation's regulation in this regard is embodied in Section 5-E of the Coast Guard's Military Justice Manual, COMDTINST M5810.1C (MJM). Specifically, section 5-E1.b. states:

> The officer exercising general court-martial jurisdiction over the accused, may in addition to authority otherwise granted, suspend or remit any part or amount of the unexecuted part of a sentence, other than a sentence approved by the president. No suspension may be for an unreasonable (sic) long period. Absent unusual circumstances, the period of suspension shall normally not exceed 18 months.

Appellant contends that the four year period of suspension in this case is unreasonably long, considering that it is two and two thirds times the normal maximum suspension period of 18 months, that it covers the full period

of confinement plus an additional two and a half years beyond that confinement, and that it includes probationary conditions that Appellant terms as onerous. Furthermore Appellant says that the suspension should be deemed unreasonably long especially since no unusual circumstances were set out in the record to support extension beyond the normal maximum period of 18 months.

The Government responds that the MJM does not require the general court-martial convening authority to articulate or consider unusual circumstances in order to suspend a sentence for longer than 18 months; that, instead, the Secretarial regulation merely points out to convening authorities that unusual circumstances provide a basis for extended suspension. In any event, according to the Government, a Secretarial regulation cannot purport to undermine the direct delegation by Congress to the convening authority of the sole discretion to modify a sentence. As the Government sees it, binding the convening authority to an 18 month limit on suspensions, absent a showing and consideration of unusual circumstances, is contrary to Article 60(c), UCMJ. With respect to this latter assertion by the Government, we disagree.

No cases are cited by the Government in support of its argument concerning a violation of Article 60(c) requirements and none has been found by us. There are decisions by the Army Court of Military Review, however, that implement with approval the Secretary of the Army's limitation of suspensions to certain fixed periods. *United States v. Koppen*, 39 M.J. 897 (ACMR 1994); *United States v. Kinney*, 22 M.J. 872, 875 (ACMR 1986); *United States v. Snodgrass*, 22 M.J. 866 (ACMR 1986); *United States v. Robertson*, 21 M.J. 1005 (ACMR 1986). The Government cites one of these cases, *United States v. Koppen, supra*, but distinguishes the type of

limitation by the Secretary of the Army from the Coast Guard's Secretarial action, which the Government characterizes and condemns as the creation of additional matters the convening authority must consider as a threshold to determining the length of a probationary suspension. We fail to recognize the distinction seen by the Government. In our view, the Coast Guard's MJM provision, like the Army's, simply sets additional limits on the terms of suspension, as authorized by RCM 1108(d). In this regard, we adopt with approval the rationale in *United States v. Kinney*, *supra*, n. 3 at 22 M.J, 875.

b. In Coast Guard, Suspensions Should Not Exceed Eighteen Months, Unless Unusual Circumstances Appear In the Record

As to the Government's initial assertion that the MJM does not require the convening authority to articulate unusual circumstances in suspending a sentence beyond 18 months, we agree. If those unusual circumstances are not articulated by the officer suspending the sentence, however, they should be readily discernible from the facts of the case, or, absent that, documented on the record by the Government. Certainly, the convening authority should consider such circumstances when contemplating the length of a suspended sentence. Section 5-E1.b, MJM, sets the normal maximum suspension period for a court-martial sentence in the Coast Guard at 18 months. In order to exceed that period, there should be unusual circumstances appearing somewhere in the record. Here, neither the convening authority nor anyone else explained why the suspension was for a period of four years rather than the normal 18 months. Without reasons having been advanced, we have looked for some basis in the facts of the case.

Rather than discovering unusual circumstances from the facts that would justify a longer than normal suspension, we

find just the opposite. Appellant's discharge was not suspended, only a portion of his confinement. With an approved and unsuspended discharge, appellant presumably will not be returned to duty upon completion of confinement, since the law authorizes his being sent home involuntarily on appellate leave awaiting completion of appellate review and the execution of his discharge[1]. While on appellate leave, there would be diminished interest and access to information concerning Appellant's activities and, thus, less likelihood that his conduct and behavior would be monitored by the Coast Guard. Moreover, upon execution of the discharge, after appellate review has been completed, the suspended confinement would be remitted pursuant to RCM 1108e, thereby terminating the period of probation. Under these circumstances, there appears to be little reason for the Coast Guard to continue a probationary suspension after Appellant has left the supervisory control of the military environment.

If the discharge in this case had been disapproved or suspended on probation, with the expectation that Appellant would return to duty after confinement, a reason might be readily apparent for an extended period of suspension. Upon return to duty, continuation of the suspension beyond the normal eighteen months called for by Secretarial regulation could be viewed as facilitating Appellant's successful reintegration into the Coast Guard community by providing strong motivation for him to continue to meet the treatment and counseling terms of probation. Appellant, while contending that four years would still be unreasonably long

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[1] Art. 76a., UCMJ authorizes the Service Secretaries to issue regulations requiring an accused with an approved and unsuspended discharge to take leave pending coapletion of Appellate review. Article 12-D-2 of the Coast Guard Personnel Manual, COMDTINST M1000.6A, sets forth procedures of such leave in the Coast Guard.

even under these circumstances, seems to concede that such factors would possibly justify a longer probationary period when he says: "[i]f the bad-conduct discharge were disapproved or suspended...the various concerns involved in determining an appropriate period of suspension may make a somewhat longer period of suspension appropriate...." n. 1, p. 4 Appellant's brief.

Here, however, the bad conduct discharge was approved without suspension and the four years probation for the suspended portion of confinement could continue for two and a half years after release from incarceration and presumed return to the civilian community, assuming the bad conduct discharge was not sooner executed. Given these facts, the unusual circumstances necessary as justification for extending the period of suspension beyond 18 months are simply not apparent from the particulars of this case. Accordingly, without justification having been set out in the record or appearing from the details of the case, the probationary period should be reduced to the 18 month normal suspension called for in MJM, section 5-E1.b, unless there is some other reason to allow the four year suspension to stand.

c. Absent Plain Error, Suspension Period Exceeding Eighteen Months Is Waived When Included In Plea Bargain and Not Objected to at Trial

The Government proffers another reason in support of the probationary term, arguing that Appellant affirmatively waived any objection to the length of the suspension by entering into a pretrial agreement which called for a four year period of probation. The Government says that Appellant took such action knowingly, intelligently, and voluntarily, with assistance of counsel, and that, absent plain error, he should not now be heard to object. We also note that no

objection to the period of suspension was raised by Appellant and his counsel when the judge covered that aspect of the plea bargain at trial as part of the interpretation and explanation of the agreement she was required by RCM 910(f) to give the accused. The Government is, therefore, correct that, unless the requirement in the agreement for a four year suspension of confinement constitutes plain error, the issue will be deemed waived pursuant to RCM 801(g) and 905(e).

The Government, citing *United States v. Olano*, 113 S. Ct. 1770 (1993), and *United States v. Toro*, 37 M.J. 313 (CMA 1993), says that plain error is an obvious error that affects substantial rights of an accused. Applying that test, the Government submits that the period of suspension is not so obviously unreasonable that it affects a substantial right of Appellant. In assessing that contention, we look first to RCM 705 to see what, if anything, the MCM says about plea agreement provisions of this nature. Certainly, if that rule prohibits their inclusion in plea bargains, then such a provision might necessarily constitute plain error, since RCM 705(c)(1)(B) generally prohibits agreement terms that deprive an accused of basic and substantial rights. Rather than prohibiting agreement provisions relating to probationary suspensions of sentences, RCM 707(c)(2)(D) expressly permits such provisions. The rule does not say anything about the length of suspensions, however. This leaves us where we started, with regulations that say the period of suspension should not be unreasonably long, which, in the Coast Guard, is normally not more than eighteen months, unless there are unusual circumstances. Given this state of affairs, we will determine whether there has been plain error based on our evaluation of the egregiousness of the period of suspension.

The period of suspension commenced when sentence was adjudged, as did the confinement. All confinement in

excess of 18 months was suspended so that a four year suspension continues for the period of unsuspended confinement plus an additional two and a half years. During that period Appellant presumably will be returned home where the terms of his probation will be unsupervised by the Coast Guard. While we do not see the particular need or interest to the Coast Guard of a probationary suspension at that point when the Appellant is no longer confined or returned to duty, we cannot say that the four year period alone is so egregious that it constitutes plain error.

Appellant contends that it is not just the length of the suspension alone that should prompt its reduction, but the additional factor of "onerous conditions on suspension that were imposed in the pretrial agreement (counseling/sex offender treatment, prohibition on contact with minors)." Appellant's brief p.3. In that regard, the plea bargain does call for compliance with requirements prescribed or ordered for the diagnosis or treatment of disorders or conditions contributing to the offense and prohibits Appellant's contact with children under eighteen, outside of his immediate family, unless supervised by other persons. Another provision forbids any contact whatsoever with the victim without permission of both her parents and requires any attempts to contact her or her family to be made through the Maintenance and Logistics Command's Legal Division. While details and possible questions concerning these provisions were not fully probed during the judge's colloquy with Appellant and Counsel, no objection to these provisions were raised at trial and they have not been challenged here except in terms of contributing to the asserted unreasonableness of the four year suspension. Although the utility of these provisions during the extended period of suspension is doubtful, we do not see them as onerous. They do not transform the suspension into

something that constitutes plain error. Accordingly, we deem the error in suspending the confinement for a period not in compliance with the military justice manual to have been waived by the Appellant.

II

THAT AN UNSUSPENDED BAD CONDUCT DISCHARGE IS AN INAPPROPRIATELY SEVERE PUNISHMENT IN THIS CASE

Appellant contends that an unsuspended punitive discharge is inappropriately severe for him and the offense of which he was convicted. In support of this contention, Appellant points to the evidence submitted in extenuation and mitigation, which he says paints a clear picture of an excellent performer who seems to have favorably impressed everyone with whom he worked, including, among others, the former Superintendent of the Coast Guard Academy, who wrote a letter in Appellant's behalf, and the current Commander of the Maintenance and Logistics Command Pacific, who testified about Appellant's excellent duty performance and personal qualities and indicated that the offense was "so far out of character for the man I think I know that I found it difficult to believe." R. at 72–78. Appellant also cites testimony from the wife of a Coast Guard petty officer who also indicated that she believed the act to be completely out of character and that she would permit Appellant to be with her children, despite his offense. In further support of this proposition, Appellant notes a submission by the counselor who worked with him between the time of the offense and the trial expressing an opinion that Appellant does not have the characteristics of pedophilia, and is not likely to molest any child in the future.

Appellant asserts that Coast Guard policy encourages the retention and rehabilitation of abusers if possible. Given this

policy, together with Appellant's superior performance for approximately nine years, the purported one-time nature of the offense, and Appellant's full acceptance of responsibility for the offense, he says an unsuspended bad conduct discharge is inappropriately severe. While Appellant argues that these factors should cause us to see the discharge as inappropriate, we view them as bearing more on clemency rather than sentence appropriateness. As we have noted before, there is a distinct difference between these two concepts. The latter is within our realm, but the former is an act of leniency outside the scope of our judicial review. *United States v. Santos*, 29 M.J. 1064 (CGCMR 1990); *United States v. Hardin*, 29 M.J. 801 (CGCMR 1989); *Garcia v. United States*, 28 M.J. 917 (CGCMR 1989); *United States v. Espinoza*, 27 M.J. 551 (CGCMR 1988). Despite the favorable matters presented in Appellant's behalf, we are unable to say that an unsuspended punitive discharge is inappropriately severe for this offense and this accused. Accordingly, Appellant's assignment of error is rejected.

III

CONCLUSION

The findings and sentence are determined to be correct in law and fact and on the basis of the entire record should be approved. Accordingly, the findings and sentence, as approved and partially suspended below, are affirmed.

Judges Bridgman and Fearnow concur.

APPENDIX J

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

USCA Dkt. No. 95-1130/CG
Crim. App. No. 1045

United States, Appellee

v.

Robert J. Nichols (455-11-9283), Appellant

ORDER

On further consideration of the granted issue 43 MJ 432 (1996), in light of *United States v. Ryder*, 44 MJ 9 (1996), it is, by the Court, this 21st day of May, 1996,

ORDERED;

That the decision of the United States Coast Guard Court of Criminal Appeals is affirmed.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of the Court

APPENDIX K

UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

Washington, DC

UNITED STATES

v.

Robert J. Nichols
Yeoman, Second Class, U.S. Coast Guard

CGCMG 0091

Docket No. 1045

14 July 1995

General Court-Martial convened by Commander, Eighth Coast Guard District, New Orleans, Louisiana. Tried at U.S. Coast Guard Group Galveston, Galveston, Texas on 8 November 1994.

Military Judge: CAPT Lane I. McClelland, USCG
Trial Counsel: LT Charles D. Michel, USCG
Assistant Trial Counsel: LCDR Thomas P. Marian, USCG
Detailed Defense Counsel: LT Edward J. Cook, USNR
Civilian Defense Counsel: Luis A. Vallejo, Esquire
Appellate Defense Counsel: LCDR Allen Lotz, USCG
Appellate Government Counsel: LCDR Charles J. Bennardini, USCG

BEFORE
PANEL TWO
BAUM, FEARNOW, AND O'HARA
Appellate Military Judges

Per Curiam:

Appellant was tried by general court-martial, military judge alone. Pursuant to his pleas of guilty, entered in accordance with a pretrial agreement, he was convicted of the following offenses: two specifications of attempted distribution of cocaine in violation of Article 80, UCMJ; one specification of conspiracy to distribute cocaine and marijuana in violation of Article 81, UCMJ; three specifications of distribution of cocaine and four specifications of distribution of marijuana in violation of Article 112a; one specification of secreting mail matter, two specifications of solicitation to distribute marijuana, and two specifications of use of a communication facility, a telephone, to facilitate a felony in violation of Article 134, UCMJ. The judge sentenced Appellant to a bad conduct discharge, eight years confinement, forfeiture of all pay and allowances, and reduction to pay grade E-1, which was approved by the convening authority as within the terms of the pretrial agreement.

Before this Court, Appellant has assigned two errors, one of which challenges the appointment of the civilian judges on this Court as violating the Constitution. That assignment has been rejected by the U.S. Court of Appeals for the Armed Forces, *United States v. Edmond*, 41 M.J. 419 (1995), *Petition for Certiorari* filed, 63 U.S.L.W.3861 (U.S. 25 May 1995)(NO. 94-1931), and it has been rejected by this Court numerous times. As before, it is again found to be without merit. Appellant's other assigned error asserts that the introduction of improper sentencing evidence resulted in a

sentence more severe than otherwise would have been imposed.

The evidence of which Appellant complains is a letter report of civil arrest for assaulting a police officer and resisting arrest included in a presentencing exhibit of extracts from Appellant's personnel record offered by the trial counsel and admitted without objection. Appellant cites *United States v. Zengel*, 32 M.J. 642, 643-644 (CGCMR 1991) in support of his argument that admission of this allegation of wrongdoing, without a showing of it's final determination, was error. *Zengel* does stand for that proposition; however, in that case the document was admitted in evidence over the accused's objection. Here, there was no objection at trial and the Government asserts waiver. Appellant claims that even without objection, there must be corrective action because admission of the document constituted plain error.

We disagree. As pointed out by the Government, plain error is a clear or obvious error that materially affects a substantial right. *United State v. Olano*, _ U.S. _, 113 S. Ct. 1770 (1993); *United States v. Toro*, 37 M.J. 313, 316-317 (C.M.A 1993). The Government correctly notes that, "[i]t is neither clear nor obvious that the admission of the final page of Prosecution exhibit 2, which consisted of 19 pages of personnel records, affected the military judge's determination of an appropriate sentence or that it affected a substantial right of appellant." Gov. Brief at 4. Appellant was convicted of serious offenses for which a maximum punishment of 173 years confinement was authorized. In recognition, of the potential severity of the sentence, Appellant pled guilty in return for a promise by the convening authority to approve no more than 15 years of confinement. The judge imposed approximately half of what the convening authority could have approved. We are convinced that the document

reflecting a civil arrest had no adverse impact on the sentence. Admission of that document did not constitute plain error. Appellant's failure to object at trial waived the issue.

We have reviewed the record in accordance with Article 66, UCMJ. Upon such review, the findings and sentence are determined to be correct in law and fact and on the basis of the entire record should be approved. Accordingly, the findings of guilty and sentence, as approved and partially suspended below, are affirmed.

Chief Judge Baum, Judge Fearnow, and Judge O'Hara concur.

APPENDIX L

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

USCA Dkt. No. 96-0401/CG
Crim. App. No. 1053

United States, Appellee

v.

Donald H. Venable (422-31-6594), Appellant

ORDER

On further consideration of the granted issue (Daily Journal March 15, 1996), in light of *United States v. Ryder*, 44 MJ 9 (1996), it is, by the Court, this 21st day of May, 1996,

ORDERED;

That the decision of the United States Coast Guard Court of Criminal Appeals is affirmed.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of the Court

APPENDIX M

UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

Washington, DC

UNITED STATES

v.

Donald H. Venable
Seaman Apprentice, U.S. Coast Guard

CGCMG 0099

Docket No. 1053

7 DECEMBER 1995

General Court-Martial convened by Commander, Fifth Coast Guard District. Tried at Fifth Coast Guard Group District, Portsmouth, Virginia on 5 July 1995.

Military Judge: CAPT Lane I. McClelland, USCG

Trial Counsel: LCDR Jeffrey C. Good, USCG

Detailed Defense Counsel: LT Robert F. Johnson, JAGC, USNR

Civilian Defense Counsel: David L. Roberts, Esquire

Appellate Defense Counsel: LCDR Allen Lotz, USCG

Appellate Government Counsel: LT Frank R. Levi, USCGR

BEFORE
PANEL FOUR
BAUM, O'HARA, AND WIESE
Appellate Military Judges

Per Curiam:

Appellant, citing *Ryder v. United States*, 115 S. Ct. 2031 (1995), has summarily assigned as error that this Court lacks jurisdiction to act in this case because of the service on the Court of a civilian judge who has not been appointed in accordance with the Appointments Clause of the Constitution and that the memorandum reappointment of that judge by the Secretary of Transportation is ineffective. This assignment has been rejected previously by this Court, *United States v. Hill*, 42 M.J. 725 (C.G.Ct.Crim.App. 1995), and it is again found to be without merit.

Without admitting that the findings and sentence are correct in fact and law, Appellant has submitted his case on its merits as to any and all issues in addition to the foregoing summary assignment of error. In this regard, we have reviewed the record in accordance with Article 66, UCMJ. Upon such review, the findings and sentence are determined to be correct in law and fact and on the basis of the entire record should be approved. Accordingly, the findings of guilty and sentence, as approved and partially suspended below, are affirmed.

Chief Judge Baum and Judges O'Hara and Wiese concur.